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In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
PETITIONER

v.

SHRADER & YORK, A TEXAS PARTNERSHIP
IN DISSOLUTION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Federal Deposit Insurance Corporation (FDIC), acting as successor to the receiver of two failed federally insured savings institutions, brought suit against respondents for contributing to the failure of the institutions by providing incompetent legal advice. Respondents defended against this suit on the ground that the Texas two-year statute of limitations for legal malpractice had run before the beginning of the receivorship. The district court and the court of appeals upheld this defense by attributing the knowledge of a malfeasant insider of the institutions to the FDIC. The question presented is whether this insider knowledge should be attributed to the FDIC, so as to bar it from recovering for professional negligence that contributed to the failure of the institutions.

PARTIES TO THE PROCEEDING

Respondents are Shrader & York, a Texas Partnership in Dissolution; Shrader, York, Clote, Hinds & Grote, P.C., Successor Organization to Shrader & York; Shrader, Clote, Hinds & Grote, P.C.; William E. York; William C. Shrader; Paul D. Clote; Gary E. Clote; Eldon L. Hinds; Lee H. Henkel III; and J.D. Page. Douglas A. Paisley II initially was a party in the lower courts, but the FDIC and he have reached a settlement agreement under which the FDIC is no longer pursuing any claims against him related to this case. See FDIC C.A. Reply Br. 1 n.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 991 F.2d 216. The opinion of the district court (App., *infra*, 26a-30a) is reported at 777 F. Supp. 533.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1993. The court of appeals denied a

petition for rehearing on July 28, 1993. App., *infra*, 31a-32a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the failure of two federally insured financial institutions, City Savings & Loan Association and Lamar Savings Association. Respondents provided legal services to both of those institutions before their failure. On May 18, 1988, the Federal Home Loan Bank Board determined that those institutions were insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver. In 1991, the Federal Deposit Insurance Corporation (FDIC)[1] brought this action, contending that during a period running from 1983 to 1985 respondents contributed to the failure of those institutions by failing to provide competent legal advice and allowing insiders to deceive the boards of directors of the institutions. The principal insider, Stanley E. Adams, Jr., pleaded guilty in February 1992 to criminal charges of conspiring to defraud the United States and making false entries in savings association records, in violation of 18 U.S.C. 371, 657, 1001, and 1006. See App., *infra*, 2a-3a.

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[1] In connection with a sale of the bulk of the assets and liabilities of the failed institutions, FSLIC as receiver transferred the claims at issue here to FSLIC in its corporate capacity. Those assets were transferred to the FSLIC Resolution Fund in August of 1989. 12 U.S.C. 1821a(a)(2)(A) (Supp. IV 1992). The FDIC brought this suit as manager of the FSLIC Resolution Fund under 12 U.S.C. 1821a(a)(1) (Supp. IV 1992). See Pet. App. 6a-7a.

2. The district court granted respondents' motion for summary judgment. App., *infra*, 26a-30a. The court stated that Adams had knowledge of respondents' activities at the time they occurred (between 1983 and 1985), and that the knowledge of Adams should be imputed to the failed institutions. Accordingly, the court ruled that the Texas two-year statute of limitations barred the FDIC's claims. *Id.* at 28a. The court rejected the FDIC's argument that Adams' knowledge of the wrongdoing should not be attributed to the institutions because he kept the directors from learning of the activity. The court stated that the "adverse domination" theory under which statutes of limitation are tolled when insiders keep knowledge of wrongdoing from shareholders applies only in suits against the insiders, not suits against third parties who participate in the wrongdoing. *Id.* at 28a-29a.

3. The court of appeals affirmed. App., *infra*, 1a-25a. Applying the two-year Texas limitations period, the court reasoned that the suit would be barred unless there was some basis for tolling the statute of limitations. *Id.* at 7a. The court first addressed the FDIC's argument that the statute of limitations did not run because it had not discovered the claims until less than two years before it filed this suit. *Id.* at 9a-24a. On that point, the court concluded that Adams had knowledge of all of the challenged activities and that under Texas law his knowledge should be attributed to the failed institutions. *Id.* at 10a-12a. The court rejected the FDIC's argument that it should be treated differently from the institutions for these purposes, because of its position as receiver; the court relied for that point on its decision in *FDIC* v. *Ernst & Young*, 967 F.2d 166 (1992). App., *infra*, 13a-15a.

The court also rejected the FDIC's argument that Adams' knowledge should not be imputed to the failed institutions because he was acting adversely to them. App., *infra*, 15a-24a. The court acknowledged that the knowledge of a malfeasant officer is not attributed to an institution where the officer acts adversely to it, but concluded that attribution was proper here, because any misconduct by Adams was "fraud for the benefit of the corporation," rather than "fraud against the corporation." *Id.* at 17a.

Finally, the court of appeals rejected the FDIC's reliance on the adverse domination doctrine. App., *infra*, 24a-25a. That doctrine "tolls the statute of limitations for claims against wrongdoing officers and directors of a corporation until they relinquish control of the institution." *Id.* at 24a. The court of appeals agreed with the district court that the adverse domination doctrine does not extend to suits against parties other than officers and directors. *Id.* at 25a.

4. The FDIC filed a petition for rehearing, with a suggestion for rehearing en banc. The court of appeals denied the petition and the suggestion without a dissent. App., *infra*, 31a-32a.

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit incorrectly resolves an issue of fundamental importance to the efforts of the Nation's financial regulators to recover from responsible parties losses those parties cause to federally insured financial institutions. The decision conflicts with the decision of the Ninth Circuit on the same issue in *FDIC* v. *O'Melveny & Meyers*, 969 F.2d 744 (1992), petition for cert. pending, No. 93-489. The Court should resolve this important question at this time.

1. The fundamental error that lies at the heart of the decision of the court of appeals in this case is the view that the FDIC's suit against respondents should be analyzed as if it were a routine dispute between businesses in the marketplace. That view ignores the special position of the FDIC as a receiver,[2] charged with collecting assets for the estate of the failed institution as a representative of the creditors of the institution and the federal depository insurance funds. As this Court has recognized, the need for uniformity in the operations of receiverships of federally insured financial institutions, coupled with the inability of receivers to acquire full knowledge of activities that took place before appointment, requires articulation of uniform rules of federal law that protect federal receivers against claims and defenses that might have been successful against the institution. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

In this situation, the rule of federal law should not permit tortfeasors to escape liability because insiders of the failed institution were aware of or participated in the wrongdoing. The Fifth Circuit's conclusion that state law requires attribution of the knowledge of those insiders to the failed institutions, and then to the FDIC, gives no weight to the federal interests in question, let alone to the distinction between the institution—whose management participated in the malfeasance—and the FDIC as an innocent after-the-fact representative of the creditors of the institution

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[2] Although the FDIC in this case technically is acting as manager of the FSLIC Resolution Fund, we do not believe there is any substantial basis for according the FDIC's rights a treatment different from what they would have received if the receiver itself had brought the suit.

and the public.[3] As the Ninth Circuit stated in *O'Melveny*, the receiver "was neither a party to the * * * inequitable conduct nor is it in a position to take action prior to assuming the bank's assets to cure any associated defects or force the bank to pay for incurable defects." 93-489 Pet. App. 14a. Hence, it is not appropriate to permit the tortfeasor to rely on the knowledge that malfeasant insiders had to bar the action of the receiver. Similarly, because the third party creditors represented by the FDIC "were not privy to the bank's inequitable conduct," the federal regulatory scheme "would be frustrated by imputing the bank's inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver." *O'Melveny*, 93-489 Pet. App. 15a.

The court of appeals' conclusion that the statute of limitations had run by the time the FDIC commenced this case rested on its holding that the knowledge of wrongdoing held by Adams—the principal insider—should be attributed to the FDIC. If that holding is reversed, as it should be, the judgment of the court of appeals cannot stand.

2. The decision of the court of appeals conflicts with the decision of the Ninth Circuit in *FDIC* v. *O'Melveny & Meyers*, 969 F.2d 744 (1992), petition for cert. pending, No. 93-489. In that case, the FDIC as receiver for a failed financial institution sued a

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[3] See *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939) (receiver represents "the entire community of interests in the corporation—creditors as well as stockholders"); *McCandless* v. *Furland*, 296 U.S. 140, 167 (1935) ("[T]he receiver does not claim to have succeeded to the rights of bondholders or noteholders to recover damages for deceit. The wrong that is here redressed is the unlawful depletion of the assets whereby the company was made insolvent and the creditors were defrauded of their lawful rights and remedies.").

law firm on the theory that misconduct in the firm's representation of the institution had harmed the institution financially. The district court granted summary judgment to the law firm, accepting the firm's argument that any misconduct was known to the institution's management, and that the knowledge of the management should be imputed to the FDIC. The Ninth Circuit reversed. The court concluded that "equitable defenses good against a bank do not carry over against the bank's receiver," 93-489 Pet. App. 14a, and explained that the federal regulatory scheme "would be frustrated by imputing the bank's inequitable conduct to the receiver," *id.* at 15a. Under that rule the Fifth Circuit would have ruled in the FDIC's favor in this case.

3. The question involved in these cases is of profound national importance. The FDIC manages the estates of literally hundreds of failed financial institutions, and in a substantial portion of those cases is pursuing claims that malfeasance by insiders—frequently aided by third parties as in this case and in *O'Melveny & Meyers*—contributed to the failure of the institution. The sums of money at stake are enormous; this case alone involves more than $20 million, and the FDIC estimates that it is pursuing similar claims in amounts that substantially exceed $1.5 billion.

4. It is important, in our view, for the Court to resolve this important issue promptly. We have today filed a brief acquiescing in the petition for certiorari in the *O'Melveny* case (a copy of which we have provided to counsel for respondents). The Court may wish to schedule this case so that it can be heard and decided in conjunction with *O'Melveny* or it may wish to grant plenary review in the *O'Melveny* case and hold this petition for disposition in light of *O'Melveny*.

The FDIC has advised us that the equitable defense context in which the issue of attribution arises in *O'Melveny* is more common in pending litigation than is the statute of limitations context in which it arises here. On the other hand, it would be useful from the standpoint of guidance to the lower courts, to the FDIC, and to parties who represent financial institutions, if the Court were to resolve all or most aspects of these attribution issues this Term.

CONCLUSION

The petition for a writ of certiorari should be granted and the case considered together with *O'Melveny & Meyers* v. *FDIC*, No. 93-489 or, alternatively, the petition should be held pending disposition of the *O'Melveny* petition.

Respectfully submitted.

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OCTOBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-6315

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.,
PLAINTIFF-APPELLANT

v.

SHRADER & YORK, ETC., ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas

May 20, 1993

Before DAVIS and JONES, Circuit Judges, and PARKER [1], District Judge.

W. EUGENE DAVIS, Circuit Judge:

The Federal Deposit Insurance Corporation (FDIC) appeals the summary judgment dismissal of

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[1] Chief Judge of the Eastern District of Texas, sitting by designation.

its legal malpractice action against the law firm of Shrader & York, its individual partners, and successor organizations (Shrader & York). We affirm.

I.

A.

The FDIC brought this legal malpractice action against Shrader & York in May of 1991. It alleges that Shrader & York negligently contributed to the failure of two of the law firm's clients, City Savings & Loan Association (City), and Lamar Savings Association (Lamar). Specifically, the FDIC points to work Shrader & York did on the following five transactions: (1) City's acquisition of Realty Development Corporation (RDC) in 1983; (2) Lamar's merger with Brazos Savings Association (Brazos) in 1983; (3) the 1984 sale by a Lamar subsidiary of property known as 8214 Westchester; (4) Lamar's acquisition of CTC (USA) Corporation (CTC) in 1985; and (5) Lamar's 1985 purchase of Stone Oak Corporation (Stone Oak).

The district court granted summary judgment in favor of the defendants, relying on the following grounds: (1) the Texas two year statute of limitations for legal malpractice claims expired before the FDIC acquired City and Lamar; (2) the FDIC lacked standing to sue Shrader & York for legal malpractice; (3) the individually named defendants were not partners in the law firm at the time of the alleged acts of malpractice; and (4) the law firm's alleged acts of malpractice could not have proximately caused the losses alleged by the FDIC, 777 F.Supp. 533. This appeal followed.

B.

Stanley E. Adams, Jr. (Adams) and his wife, Christie Bell, purchased Lamar in 1969. In 1979 Adams formed Lamar Financial Corporation (LFC) as Lamar's holding company. In 1983 LFC purchased City. Adams served as chairman of the board of directors and chief executive officer of Lamar from January of 1980 through December of 1985; as a director of LFC during the same time period, and as chairman of the board of directors of LFC from January of 1983 through December of 1985. Adams served as City's vice president from January of 1983 until May of 1986, and as a director of City from December of 1985 to April of 1986. From December of 1985 until October of 1986, Adams owned 100% of City's stock. In February of 1992, Adams pled guilty to conspiracy to defraud the United States, and false entries in savings association records, in violation of 18 U.S.C. §§ 371, 657, 1006, and 1001.

On May 18, 1988, the Federal Home Loan Bank Board (FHLBB) determined that City and Lamar were insolvent, and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as their receiver. The FSLIC—Receiver sold to the FSLIC, in its corporate capacity, City and Lamar's claims against professionals providing services to these thrifts. The FDIC acquired these causes of action by operation of § 401 of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 (FIRREA).

The FDIC alleges that Shrader & York contributed to the collapse of City and Lamar by doing faulty legal work in the five transactions at issue. With respect to all five transactions the FDIC alleges that

Shrader & York failed to give City and Lamar competent legal advice to the point that some transactions violated federal laws. The FDIC contends that Shrader & York allowed Adams to deceive the Lamar and City directors. According to the FDIC's theory of the case, if Shrader & York had alerted the City and Lamar boards of the illegal nature of the five transactions, the boards would have blocked the transactions, thereby averting huge losses. The FDIC describes the five transactions as follows:

1. City's acquisition of RDC: In 1983 City paid $30 million for RDC, a troubled asset. RDC's principals then purchased $10 million of LFC preferred stock. Thus LFC used the RDC acquisition to funnel $10 million of City's cash to LFC, allowing LFC to repay the loan LFC secured to purchase City. The FDIC contends that this violated federal regulations prohibiting a holding company's subsidiary thrift from investing its funds in an affiliate's obligation. The FDIC further contends that Shrader & York knew that the transaction was unlawful, but failed to inform any disinterested officer or director of City. According to the FDIC, City's losses from the RDC acquisition exceeded $5 million.

2. Lamar's acquisition of Brazos: In July of 1982 Lamar agreed to acquire Brazos. The acquisition agreement provided that compensation to Brazos officers and directors would increase only in the ordinary course of business, and that Lamar and Brazos would bear their own merger expenses. In July of 1983 Shrader & York certified that the merger complied with the acquisition agreement and applicable laws. The FDIC claims that Shrader & York failed to report numerous violations of the merger agree-

ment. For example, the FDIC alleges that Brazos paid $155 thousand of Lamar's merger-related expenses. More significantly, the FDIC alleges that officers and directors of Lamar and Brazos wasted nearly $8 million in Brazos assets through conduct such as (1) paying nearly $1 million in bonuses to senior officers of Lamar and Brazos; (2) giving 71 automobiles to officers, directors and employees of Lamar, City, and Brazos; (3) giving Rolex watches to Brazos directors; (4) constructing a greenhouse at Adams's house and an airstrip at Adams's ranch; and (5) buying a $72 thousand diamond ring for Adams's wife.

3. Lamar's sale of 8214 Westchester: Lamar loaned $10.5 million to Drew Mortgage Company, an entity owned by Lamar and City for development and construction of 8214 Westchester, Lamar's Dallas headquarters. The FDIC alleges that in 1984 Shrader and York formed a limited partnership, 8214 Westchester Ltd., to purchase the property. The limited partnership borrowed $15 million in purchase financing from Mainland Savings (Mainland). Mainland participated $8.8 million of the loan back to Lamar. Later, Lamar purchased the remaining $6.2 million of the loan. The FDIC claims that the sale was a scheme to avoid classifying the loan as a nonperforming depreciable asset, for 1984. It also alleges that Lamar lost $4 million on this transaction.

4. Lamar's acquisition of CTC: In 1985 Lamar made a direct investment in CTC, a software development corporation. The FDIC alleges that Lamar's regulatory capital was below the minimum level necessary to make direct investments unsupervised by federal regulators. The FDIC further alleges that

Shrader & York prepared the documentation for the investment, but failed to advise Lamar's board of directors of the need to obtain regulatory approval for the investment. The FDIC alleges that Lamar lost over $1 million on the transaction.

5. Lamar's purchase of Stone Oak: In 1985 Lamar and LFC acquired Stone Oak, a real estate development corporation, for $84.2 million. Again, the FDIC alleges that Lamar had insufficient regulatory capital to make unsupervised direct investments. It alleges that Shrader & York failed to advise Lamar's board of the need to obtain prior approval of the investment. The FDIC alleges that Lamar lost $25 million on the investment.

II.

Because the FDIC's standing to sue is a threshold inquiry, we deal with it first. The district court concluded that the FDIC's standing to sue Shrader & York was based on Lamar and City's shareholders' right to sue. Because the shareholders lacked standing, the district court concluded that the FDIC also lacked standing.

The FSLIC-Receiver, as successor to Lamar and City, acquired all of the two thrifts' assets, including their claims against Shrader & York. 12 C.F.R. §§548.2(f), 549.3 (FSLIC regulations in effect at the time the FSLIC was appointed receiver of City & Lamar). The FSLIC-Receiver then assigned these to the FSLIC-Corporate. See 12 U.S.C. § 1729(f)(2)(A) (1989). By operation of FIRREA, the FSLIC was abolished and the FDIC succeeded to all of the FSLIC's assets. 12 U.S.C. § 1821a(a)(1).

The FDIC therefore has standing to sue Shrader & York.[2]

III.

The district court concluded that City and Lamar's legal malpractice claims against Shrader & York were time barred before the FSLIC acquired them on May 18, 1988. FIRREA's statute of limitations, 12 U.S.C. § 1821(d)(14) does not revive stale state law claims acquired by the FSLIC or FDIC. *F.D.I.C. v. Belli*, 981 F.2d 838, 842 (5th Cir.1993); see also *Federal Deposit Ins. Corp v. Hinkson*, 848 F.2d 432, 434 (3rd Cir.1988). The FSLIC acquired City and Lamar's legal malpractice claims against Shrader & York in May of 1988. Thus if City and Lamar's claims against Shrader & York expired before May of 1988, Shrader & York's statute of limitations defense is meritorious.

The Texas limitation period for legal malpractice claims is two years. Tex.Civ.Prac. & Rem.Code Ann. § 16.003 (Vernon 1986); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex.1988). The parties do not dispute that the occurrences giving rise to the legal malpractice claims against Shrader & York took place well before May of 1986. So the claims all expired before May of 1988 unless one of the equitable doctrines urged upon us by the FDIC operates to extend the limitation period.

The FDIC argues that two equitable doctrines should extend the limitation period. First, it argues, Texas's discovery rule kept the statute of limitations from running before May of 1988. Second, it argues,

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[2] We discuss the FDIC's standing in further detail in section III of this opinion.

the doctrine of adverse domination tolled the running of the statute of limitations.

Summary judgment is appropriate if, after discovery, there is no genuine dispute over any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986); see also Fed.R.Civ.P. 56. Material facts are those that will affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 247, 106 S.Ct. at 2510. A genuine dispute requires more than metaphysical doubt; there must be an issue for trial. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355-56. Once the moving party for summary judgment shows the absence of a material factual dispute, the burden shifts to the non-moving party to designate specific facts establishing an issue for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552-53.

In Texas, the party seeking to benefit from discovery rule "bear[s] the burden of proving and securing favorable findings thereon." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). A Texas rule of summary judgment procedure requires the moving party to negate the discovery rule by proving as a matter of law that no issue of material fact exists concerning when the plaintiff discovered or should have discovered its cause of action. *Woods*, 769 S.W.2d at 518 n. 2. However federal courts follow the federal rule of summary judgment procedure. *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1036 n. 10 (5th Cir.1982); *Schultz v. Newsweek, Inc.*,

668 F.2d 911, 917 (6th Cir. 1982). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue," the nonmoving party must go "beyond the pleadings" and produce summary judgment evidence designating " 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.Pro. 56(e)). So the FDIC bore the burden of producing some summary judgment evidence in support of its discovery rule argument. See *McLaren v. Imperial Cas. and Indem. Co.*, 767 F.Supp. 1364, 1378 (N.D.Tex.1991), *aff'd in part without op.*, 961 F.2d 213 (5th Cir. 1992).

A.

In its first response to Shrader & York's limitations defense, the FDIC asserts that Texas's discovery rule kept the statute of limitations from expiring before May of 1988. Under Texas's discovery rule, the statute of limitations for legal malpractice actions does not begin to run until "the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action." *Willis*, 760 S.W.2d at 646. In *Willis*, the Texas Supreme Court noted that clients often lack the expertise to recognize a lawyer's negligence, and that "[f]acts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved." *Willis*, 760 S.W.2d at 645-46.

In Texas, a legal malpractice claim, which is based on negligence, requires proof of four legal malpractice elements: (1) the existence of a duty on the part of one party to another; (2) breach of that duty; and

(3) injury (4) proximately caused by the breach. *Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 376 (Tex.1984). Proximate cause includes foreseeability and cause in fact. *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex.1980). After reviewing the record, we conclude that the district court correctly determined that Texas's discovery rule did not keep the statute of limitations from expiring before May of 1988.

1.

Texas's discovery rule does not operate to extend the time limitation on the RDC acquisition, the 8214 Westchester transaction, the CTC acquisition, or the Stone Oak acquisition past May of 1988. The summary judgment record demonstrates that Adams was intimately familiar with these four transactions and knew the facts that the FDIC contends Shrader & York should have cautioned City and Lamar about. We conclude that Adams's knowledge should be imputed to City and Lamar. The FDIC vigorously challenges both conclusions, particularly the second.

The FDIC contends that the district court erroneously presumed that because Adams had knowledge of Shrader & York's activities he knew of Shrader & York's malpractice. The FDIC's argument assumes that Texas's discovery rule requires actual knowledge. In fact, the limitations period on a legal malpractice claim begins to run when "the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action." *Willis*, 760 S.W.2d at 646.

As the majority owner of LFC, the chairman of LFC's board of directors from January of 1983 through December of 1985, chairman of the board of

directors, chief executive officer and a director of Lamar from January of 1980 through December of 1985, and sole shareholder of City from October of 1984 to December of 1985, Adams was intimately involved with the transactions at issue. In a related action, *Lamar Financial Corporation v. Adams*, No. Civ. A. A-88-CA-183 (W.D. Tex.), the FDIC's second amended complaint pled that Adams and his family were the majority shareholders of LFC during the periods relevant to this suit. It further alleges that "Adams was in control of the affairs of LFC, Lamar and City."

In *Lamar Financial Corporation v. Adams*, the FDIC accused Adams of "deliberately . . . entering into unsafe and unsound transactions" that "generated no new cash to Lamar," but "dramatically increased [Lamar's] exposure to risk," and caused Lamar to sustain losses. Moreover, the FDIC pled that Adams and others "carried out a scheme" to "disguis[e] and hid[e], from regulatory authorities, depositors, creditors and others, the negative impact of these risky loans and investments upon [Lamar's] regulatory worth." According to the FDIC's second amended complaint, one of Adam's schemes was to sell real estate securing delinquent loans and real estate acquired through foreclosure to third party "strawmen" to boost Lamar's regulatory net worth. This pattern matches the FDIC's description of the 8214 Westchester transaction. The second amended complaint further contended that Adams was involved in City's acquisition of RDC, "caus[ing]" City to purchase RDC and then "fund RDC through capital contributions in excess of $85 million."

The FDIC claims, in one breath, that Adams engaged in elaborate schemes to circumvent banking

regulations. It cannot claim in the next breath that Adams was not aware that Shrader & York negligently facilitated those schemes. Thus the summary judgment evidence establishes that Adams should have discovered, through the exercise of reasonable care and diligence, the losses caused by the schemes and the other facts establishing City and Lamar's legal malpractice claims against Shrader & York. We also conclude, as a matter of law, that Adams's knowledge should be imputed to City and Lamar. This is consistent with the generally accepted rule that a bank officer or director's knowledge is imputed to the bank. *F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir.1992).

Texas has applied imputation principles to determine when the statute of limitations began to run on a corporation's cause of action. *Alice Roofing & Sheet Metal Works, Inc. v. Halleman*, 775 S.W.2d 869 (Tex.App.1989) (Alice Roofing). In *Alice Roofing*, a corporation took out a loan and repaid it with corporate funds. However, the sole shareholder of the corporation used the proceeds of the loan for non-corporate purposes, thus making himself liable to the corporation. *Alice Roofing*, 775 S.W.2d at 869-70. The sole shareholder then sold the corporation to two other individuals, allegedly concealing documents evidencing his debt to the corporation. *Alice Roofing*, 775 S.W.2d at 870. When the new owners learned of the debt the corporation sued the former shareholder. *Alice Roofing*, 775 S.W.2d at 870. The court of appeals held that the statute of limitations on the corporation's cause of action began to run when the corporation took out the loan, not when the new owners learned of the debt. *Alice Roofing*, 775 S.W.2d at

870. It said: "When the 1973 transaction took place, the corporation had full knowledge of the transaction because it was acting through [the former sole shareholder], its agent." *Alice Roofing*, 775 S.W.2d at 870.

The FDIC strenuously urges that several exceptions preclude us from applying this general rule of imputation. The FDIC first argues that we should consider its special status as successor to the FSLIC receiver of City and Lamar and not hold it to the general rule of imputation. Next, the FDIC contends that Adams's knowledge cannot be imputed to City or Lamar because he acted adversely to their interests. Relatedly, the FDIC maintains that Adams was not disinterested. Finally, the FDIC argues that we should not apply the general rule of imputation in favor of Shrader & York because it is not an "innocent party" and had a duty to protect the thrifts from Adams's misconduct. We will consider each argument in turn.

The FDIC argues first that, as statutory representative of the insolvent institutions' creditors, it is not an ordinary assignee. Therefore, it argues, even if imputation might have been appropriate against City and Lamar, it is not appropriate against the FDIC. We rejected this argument in *Ernst & Young*, 967 F.2d at 169, 170, which involved an FDIC professional malpractice suit against a failed S & L's former outside auditor. At issue was whether the knowledge of the failed S & L's former dominating director could be imputed to the FDIC. We acknowledged that *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), and its progeny give specific rights to the FDIC when

it seeks to recover on defaulted loans from borrowers of failed banks. However we held that "the FDIC is not entitled to special protection when it brings a tort claim against a third party on behalf of a defunct financial entity." *Ernst & Young*, 967 F.2d at 170. In reaching this conclusion, we relied on *FDIC v. Cherry, Bekaert & Holland*, 742 F.Supp. 612, 615 (M.D.Fla. 1990) (Cherry), which found "no reason" to treat the FDIC "differently than any other assignee" when it prosecutes a professional liability suit. Because the FDIC could only recover " 'those damages potentially available to [its] assignor,' " we held that the bank officer's knowledge, which would have been imputed to the bank, was imputable to the FDIC. *Ernst & Young*, 967 F.2d at 169, 170 (quoting *State Fidelity Mortgage Co. v. Varner*, 740 S.W.2d 477, 480 (Tex.App.1987)).

The FDIC attempts to distinguish *Ernst & Young*, arguing that, in this case, it is suing on behalf of depositors and other creditors, not just on behalf of the failed institutions. *Ernst & Young* is indistinguishable. There, as here, the FSLIC was appointed receiver of a failed institution and transferred the institution's claims against professionals to the FSLIC—Corporate. In both cases, the FDIC acquired the claims pursuant to FIRREA. See *F.D.I.C. v. Ernst & Young*, 1991 WL 197111 (N.D.Tex.). The FDIC cites 12 U.S.C. § 1821(d)(2)(A)(i), and 12 C.F.R. §§ 549.3(a), 549.2(f) for the proposition that it may assert claims on behalf of both the insolvent institution and its creditors. The FDIC brought the same argument and the same authority to the attention of this Court in *Ernst & Young*. We rejected the FDIC's argument and concluded with re-

spect to its malpractice suit against the failed bank's accountants that "the FDIC does not cite any statutory authority affording it special protection.'" *Ernst & Young*, 967 F.2d at 169, 170 (quoting *Cherry*, 742 F.Supp. at 614, 615). Moreover, in this case, the FDIC has not pled or offered summary judgment evidence that City and Lamar's depositors and other creditors were clients of Shrader & York, and thus able to sue Shrader & York for professional malpractice. See *Thomas v. Pryor*, 847 S.W.2d 303, 304 (Tex.App.1992) ("Under Texas law, an attorney can be held liable for professional malpractice only to a person with whom the attorney has privity, meaning to a client."); *First Mun. Leasing v. Blankenship, Potts*, 648 S.W.2d 410 (Tex.App.1983). So the FDIC fails to explain how it improves its position by standing in the shoes of depositors and other creditors. *Ernst & Young* therefore controls this issue, and we hold that imputation is appropriate in this case. If City and Lamar knew what Adams knew, before May of 1986, the FSLIC acquired only stale claims against Shrader & York when it was appointed receiver of City and Lamar.

We now turn to the FDIC's argument that Adams acted adversely to City and Lamar. As the FDIC contends, courts will generally not impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank. *F.D.I.C. v. Lott*, 460 F.2d 82, 88 (5th Cir. 1972). The Restatement (2d) of Agency formulates the adverse interest exception as follows: "A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purposes. . . ." Restatement (2d) of

Agency § 282(1) (1957), cited with approval in *Forest Park Lanes, Ltd. v. Keith*, 441 S.W.2d 920, 931 (Tex.Civ.App.1969). According to this formulation, an agent's knowledge falls within this exception only if the agent acts "entirely for his own or another's purposes." In other words, "knowledge is imputed in a case of 'joint' interests even though the agent's primary interest is inimical to that of the principal." 3 Fletcher Cyclopedia Corporations § 822 at 126 (perm. ed.). The paradigm case for applying this exception is where a bank's officer, on behalf of his bank, gives a corporation in which he has an interest a concession to which it is not entitled, such as a below-market price or rate of interest. 3 Fletcher Cyclopedia Corporations § 823 at 127.

Our understanding of this exception is further guided by three cases. The first, *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S.W. 584, 590-91 (1919), was cited to us by the FDIC. According to *Goldstein*, we should ask whether, under all the circumstances of the particular case,

> the agent's interests are so incompatible with the interests of his principal as practically to destroy the agency or to render it reasonably probable that an ordinary person, in the agent's position, under such circumstances, will neither act in behalf of his principal upon his so acquired knowledge, nor disclose that knowledge to his principal, but, because of such incompatibility in interests, will withhold knowledge from the principal.

Goldstein, 213 S.W. at 590-91. It is "inaccurate" and goes "too far" to say that the exception involving adverse interest applies if "the individual interests of

an agent are to any extent adverse to that of his principal." *Goldstein*, 213 S.W. at 590.

Second, we look to our recent decision in *Ernst & Young*, 967 F.2d at 168-71. In that case the FDIC, as receiver of a failed savings and loan, sued the S & L's outside auditor for professional malpractice. *Ernst & Young*, 967 F.2d at 168. The S & L's sole shareholder, who was also its chairman of the board and chief executive officer had brought losses to the S & L through fraudulent and illegal activities. *Ernst & Young*, 967 F.2d at 168. Those activities included pursuing "complex commercial ventures that were often based on unsafe and unsound underwriting practices," entering into transactions that generated "paper profits, making [the S & L] appear solvent," making false entries in the S & L's books "with intent to deceive [the S & L's] board and government regulators," conspiring to misapply the S & L's funds, and "numerous violations of Bank Board regulations." *Ernst & Young*, 967 F.2d at 168.

In *Ernst & Young*, we explained that facts acquired by the officer committing fraud against the corporation are not imputed to the corporation. We applied an explanation of "fraud against the corporation" given in *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982). We explained that "fraud against the corporation usually hurts just the corporation; the stockholders are the principal if not only victims. . . ." *Ernst & Young*, 967 F.2d at 171. On the other hand, we explained, "fraud for the benefit of the corporation" primarily benefits the corporation's stockholders and injures

"outsiders to the corporation." *Ernst & Young*, 967 F.2d at 171. Applying this explanation, we held that the officer's knowledge should be imputed to the S & L: the officer "acted on the corporation's behalf because by serving [the S & L], he served himself, [the S & L's[sole owner. As the sole owner, [the officer's] fraudulent activities on [the S & L's] behalf benefitted himself and injured . . . depositors and creditors." *Ernst & Young*, 967 F.2d at 171.

In *Cenco*, insiders of a corporation were "deeply involved" in a "massive fraud" that consisted mainly of "inflating inventories in the Medical/Health Division far above their actual value." *Cenco*, 686 F.2d at 451. This fraud increased Cenco's apparent worth, as well as the market price of its stock. *Cenco*, 686 F.2d at 451. Thus, Cenco was able to "buy up other companies on the cheap" as well as "borrow money at lower rates than if its inventories had been honestly stated." *Cenco*, 686 F.2d at 451. In the litigation that followed discovery of the fraud, the company asserted a cross claim against its independent auditor for failing to prevent the fraud. *Cenco*, 686 F.2d at 451. The Seventh Circuit said that the fraud was on behalf of the corporation: "those involved in the fraud were not stealing from the company, as in the usual corporate fraud case, but were instead aggrandizing the company (and themselves) at the expense of outsiders. . . ." *Cenco*, 686 F.2d at 451, 456.

At trial, to successfully establish that Adam's knowledge of the fraudulent activity was not imputed to the corporation under the discovery rule, the FDIC would have to prove that Adams acted adversely to or committed fraud against City and/or Lamar. Therefore, to avoid summary judgment dis-

missal, it bore the burden of producing some summary judgment evidence in support of this argument.

The summary judgment evidence indicates that Adams misappropriated funds in connection with the Brazos merger.[3] However the FDIC did not offer summary judgment evidence that Adams embezzled, looted, or otherwise personally profited at the expense of City or Lamar in connection with the other four transactions. The five transactions at issue are independent. So Adams's possible adverse interest in one transaction does not spill over into other transactions for purposes of the imputation rule.

The FDIC urges us to infer that Adams breached his fiduciary duty to the institutions' depositors and creditors. Creditors were injured when Adams's frauds were uncovered. However, *Cenco* and *Ernst & Young* teach that fraud on behalf of a corporation, as opposed to fraud against the corporation, almost always injures a corporation's creditors. *Ernst & Young*, 967 F.2d at 171, *Cenco*, 686 F.2d at 456.

The FDIC also argues from the summary judgment evidence that Adams fraudulently inflated Lamar's regulatory net worth, and that he concocted sham transactions to deceive federal regulators so that he could retain his control over the institutions. However, the summary judgment evidence indicates that any fraudulently inflated profits went on the books of Lamar and City, not into Adams's personal account. Adams's desire to maintain control over City and Lamar, by itself, does not bring Adams's conduct within the adverse interest exception, under any of the formulations we have discussed.

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[3] Because the Brazos merger was unusual in this respect, we discuss it in the next section of this opinion.

An examination of the individual transactions reveals the inadequacy of the FDIC's summary judgment evidence on this issue. Concerning the RDC transaction, the FDIC alleges that City paid too much for a worthless asset in order to bypass regulations forbidding City from "upstreaming" capital to LFC. The FDIC's complaint can be broken down into two elements: that City paid too much for RDC, and that City gave $10 million to its sole shareholder, LFC.[4] The FDIC does not present evidence raising a fact question of whether Adams personally profited from City getting a bad deal on RDC. The FDIC's pleadings suggest that Adams, as majority owner of LFC, might have personally benefitted from City's capital contribution to LFC. However the upstreaming violation did not change the value of LFC's total assets. So the value of Adams's LFC stock presumably did not increase either. If the upstreaming violation rendered City undercapitalized, it may have given Adams an advantage over City's creditors. But the FDIC has not produced summary judgment evidence that the transaction left City undercapitalized. Moreover, as we have explained, an advantage over creditors does not come within the adverse interest exception. *Ernst & Young*, 967 F.2d at 171. *Ernst & Young* is made more applicable to this transaction by the fact that Adams acquired 100% of City's stock in December of 1985. After October of 1986, Adams was no longer City's sole shareholder. However, we cannot say that City, at

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[4] The number is closer to $8.5 million. The FDIC's second amended complaint in *Lamar Financial Corporation v. Adams* claimed that, by the Fall of 1983, LFC had repurchased the stock held by RDC's principals for approximately $1.5 million.

that point, ceased to know what it already knew. *Alice Roofing*, 775 S.W.2d at 870.

Concerning the 8214 Westchester transaction, the FDIC alleges that Lamar lost $4.5 million trying to hide a bad loan from federal regulators through a series of sham transactions. This attempt to make it appear that Lamar had a positive net worth resembles the frauds in *Ernst & Young* and *Cenco*. *Ernst & Young*, 967 F.2d at 171; *Cenco*, 686 F.2d at 451. Again the FDIC fails to offer evidence that Adams personally profited from this transaction at Lamar's expense. The inflated net worth went on to Lamar's books, not into Adams's personal account.

The FDIC also fails to meet its burden with respect to Lamar's direct investments into CTC and Stone Oak. The FDIC alleges that Lamar directly invested in CTC and Stone Oak when its capital was too low to lawfully do so. If these ventures had succeeded, Lamar, not Adams, would have reaped the profits. Although hindsight reveals that Lamar paid too much for its investments, the summary judgment evidence does not allow an inference that Adams personally profited from Lamar's unwise investments.

Moreover, the record shows that federal regulatory officials made Lamar's board aware of the regulatory violations. In June of 1985, LFC received a letter from the FHLBB expressing "concern with [Lamar's] financial condition." The letter explained that Lamar had a current negative net worth and was losing "approximately $1,000,000" per month. The FHLBB explained that it would request a supervisory agreement if LFC did not infuse Lamar with new capital or take other steps to correct the problem.

In November of 1985 Lamar received another letter from the FHLBB. That letter explained that Lamar had "failed to meet its net worth requirements." In the letter, the FHLBB made clear that it considered unauthorized direct investments during the quarter following June 30, 1985 a "direct violation of the Insurance Regulations." It further explained that Lamar's "failure to maintain an adequate level of net worth" was "exacerbated by investment in acquisition, development, and construction loans and real estate that is substantially higher than the national average for such investments." The FHLBB prohibited direct investments made without prior written approval of the Supervisory Agent. These letters bolster our conclusion that Lamar should have discovered the facts establishing any possible malpractice claims against Shrader and York arising out of the CTC and Stone Oak investments.

We next consider the FDIC's argument that Shrader & York is not entitled to the benefit of the general rule of imputation because it is not an innocent party and had a duty to protect City and Lamar from Adams's misconduct. Application of such an exception would require a showing that Shrader & York colluded with Adams to defraud City and Lamar. *See, e.g., Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610, 615 (Tex.Civ.App.1979) ("The [imputation] rule is for the protection of innocent third parties and does not protect those who collude with the agent to defraud the principal.") (emphasis added). The FDIC has not alleged or produced summary judgment evidence that Shrader & York colluded with Adams, or that it did so to de-

fraud City and Lamar. It has only alleged that Shrader & York performed its duties negligently. This argument therefore has no merit.

2.

We also affirm the district court's ruling as to the malpractice claims arising out of the Brazos merger. The FDIC claims that Adams used the Brazos merger to waste millions of dollars of Lamar assets. So Adams's knowledge with respect to this transaction might not be imputable to Lamar. Still, the record reveals that Lamar's Board of Directors had a considerable amount of concrete information about the Brazos merger that should have put it on notice of potential legal malpractice claims arising out of Shrader & York's work on that merger. In November of 1983 Lamar's board received a letter from Peat Marwick, the accounting firm that represented Brazos in the merger. The letter pointed out that "[G]eneral and administrative expenses for the [April 1, 1983-June 30, 1983] period were approximately $9.2 million (unaudited), as compared to approximately $1.2 million (unaudited) for the prior three-month period." Commenting on the unusual nature of the expenses, the letter noted that some of the "$9.2 million was expended on automobiles for the benefit of certain directors, officers, or employees of Lamar and Brazos." The letter drew attention to fact that the merger agreement between Lamar and Brazos forbade salary increases outside the ordinary course of business. Peat Marwick considered this activity so serious that its earlier report of July 5, 1983 could "no longer be relied on."

The FDIC argues that a subsequent investigation of the expenses, conducted by the outside law firm of McKenna, Connor & Cuneo, did not accuse Shrader and York of any wrongdoing. The scope of the investigation included "the records" of Lamar and Brazos relating to the acquisition of Brazos by Lamar, and the "related public disclosures and filings with the Bank Board." The outside law firm was to "prepare a report of its investigation and recommendations to correct improper actions to the board of directors." Even though the investigation's scope was potentially expansive, the investigation focused mainly on the actions of Lamar and Brazos insiders. We still conclude that a reasonable person, armed with this information, exercising reasonable care and diligence, would have discovered facts establishing Lamar's causes of action against Shrader and York.

B.

The FDIC argues that Adams adversely dominated City and Lamar, and that, therefore, City and Lamar's causes of action against Shrader and York did not begin to run until Adams lost his grip on City and Lamar. Because the FDIC is suing the corporations' outside counsel, and not their officers or directors, the district court declined to apply the adverse domination doctrine.

This very narrow doctrine has been applied to suits by a corporation against the officers or directors of that company. In appropriate cases, it tolls the statute of limitations for claims against wrongdoing officers and directors of a corporation until they relinquish control of the institution. *F.D.I.C. v. Howse*, 736 F.Supp. 1437, 1442 (S.D.Tex.1990). The doc-

trine's primary policy rationale is that a wrongdoing corporate officer or director will seek to hide his or her wrongful conduct from the corporation. *Howse*, 736 F.Supp. at 1442.

The FDIC contends that the adverse domination doctrine is not limited to suits against a corporation's officers and directors. In the FDIC's view, the policy rationale for the doctrine applies in this case because Adams prevented City and Lamar from suing Shrader & York in order to avoid exposure of his own wrongdoing.

The FDIC has not produced any cases from Texas or this Court that extend the adverse domination doctrine beyond corporate officers and directors. Moreover, the FDIC does not allege that Shrader and York committed intentional torts, or conspired with Adams to defraud City or Lamar. Thus we agree with the district court that, in this particular case, Texas's discovery rule adequately addresses the FDIC's policy concern.

IV.

For the reasons stated above, we AFFIRM the district court's order.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. TEXAS
HOUSTON DIVISION

Civ. A. No. H-91-1372

FEDERAL DEPOSIT INSURANCE CORPORATION,
PLAINTIFF

v.

SHRADER & YORK, ET AL., DEFENDANTS

Sept. 5, 1991

ORDER

NORMAN W. BLACK, District Judge.

Pending before the Court is Defendants' Motion for Summary Judgment, or, to Dismiss for Failure to State a Claim for which the Court can Grant Relief.

On May 17, 1991, the FDIC brought a legal malpractice lawsuit against Shrader & York. The FDIC's claims are based on the law firm's alleged negligence in failing to advise two savings and loan associations, City Savings and Loan Association ("City") and Lamar Savings Association ("Lamar"), to obtain regulatory approval for certain business transactions. De-

fendants make four arguments in support of their motion for summary judgment: (1) the applicable statute of limitations had run at the time the FDIC acquired the claims; (2) the shareholders of City and Lamar, on whose behalf the FDIC has filed suit, lack standing to sue Shrader & York for legal malpractice; (3) the individually named Defendants were not partners in the law firm at the time of the alleged acts of malpractice; (4) the FDIC has not shown that the law firm's alleged act of malpractice proximately caused damage to the shareholders.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Plaintiff's claims are based on the following four transactions: City's acquisition of Realty Development Company in 1983; Lamar's acquisition of Brazos Savings Association in 1983; Lamar's acquisition of stock in CTC Corporation in 1985; and the purchase of Stone Oak property in 1985. Defendants argue in support of their motion for summary judgment that the applicable two year statute of limitations had run at the time the FDIC took over Ciy and Lamar and acquired the claims. Defendants cite *Gleasman v. Jones, Day, Reavis & Pogue*, 933 F.2d 1277 (5th Cir.1991) in support of their argument

that the alleged causes of action accrued when City and Lamar knew or should have discovered by reasonable investigation either: a) the financial losses allegedly resulting from the transactions or b) the existence of acts of malpractice. *Gleasman*, at 1278.

In Plaintiff's original petition, the FDIC states that the Defendant Stanley E. Adams acted as the "driving force" behind the transactions at issue in the case. Adams was a Director of Lamar from January 1, 1980 through December 19, 1985 and served as Lamar's Chairman of the Board and Chief Executive officer during that time. Further, Adams was Vice President of City during the period in question and acquired 100% of the stock of City in 1985. In light of Adams' significant control over the activities of City and Lamar, the Court finds that the corporations had knowledge of Shrader & York's alleged acts of malpractice in 1983 and 1985.

In response to Defendants' argument, Plaintiff asserts that the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA") preempts the Texas statute of limitations and acts to "revive" the FDIC's claims against the law firm. Plaintiff contends that pursuant to FIRREA the FDIC had three years from the time it acquired the institutions to bring the lawsuit. Plaintiff also asserts that even if the Court fails to apply the FIRREA timetable, the statute of limitations in this lawsuit is tolled based on the "adverse domination" principle.

The Court finds that Plaintiff has failed to present any legal authority to support the notion that FIRREA "revives" barred claims. In the absence of such authority, the Court declines Plaintiff's invitation to adopt a rule whereby the FDIC's acquisition

of a failed institution would revive a claim even though it might be 20 or 30 years old. Regarding the "adverse domination" theory, the Court is of the opinion that Plaintiff has failed to show that the doctrine has bearing in this case. In shareholder derivative suits against officers or directors of a corporation, courts toll the applicable statute of limitations when the shareholders failed to gain knowledge of wrongdoing because the corporation was "adversely dominated," or controlled by the perpetrators of the wrongdoing. In the case at hand, in which the shareholders are suing a third party law firm, the Court sees no justification for applying the "adverse domination" theory to toll the applicable statute of limitations.

Defendants also contend that the Court should dismiss Plaintiff's claims because the shareholders of Lamar and City lack standing to sue the third party law firm for malpractice. The Court agrees. The shareholders do have standing to assert a derivative claim against the officers or directors for failing to sue the law firm at the time of the alleged acts. Further, the Court agrees that Plaintiffs have failed to show that the alleged acts of malpractice proximately caused the financial loss complained of by Plaintiff. The Fifth Circuit has held that "causing a party to enter a transaction that loses money does not make the procuring party liable for the transactional loss. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 555 (5th Cir.1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). In the absence of such summary judgment evidence, the Court finds that Plaintiff's claims lack merit.

For the reasons stated above, it is hereby ORDERED that Defendants' motion for summary judgment (entry #15) is GRANTED. It is further

ORDERED that Defendants' supplemental motion in favor of Clote, Hinds, and Grote (entry # 16) is GRANTED. The evidence before the Court shows that these individuals were not yet partners of Shrader & York at the time of the transactions at issue in this lawsuit. In Texas, "an incoming partner is not personally liable for obligations existing at the time of entry into the partnership." *Miller v. Doughty*, 520 S.W.2d 586, 590 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.). Thus, Defendants Clote, Grote, and Hinds are liable only to the extent of their interests in the partnership. It is further

ORDERED that Defendant Paisley's motion for summary judgment (entry # 34) is GRANTED. After an ample amount of time to conduct discovery, Plaintiff has failed to present evidence to raise a fact quesion concerning Paisley's participation in the firm at the time of the transactions. It is further

ORDERED that motion to strike (entry #14) is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6315

FEDERAL DEPOSIT INSURANCE
CORPORATION, ETC., PLAINTIFF-APPELLANT

versus

SHRADER & YORK, ETC.,
ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(July 28, 1993)

Before DAVIS, JONES and PARKER, Circuit Judges.

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

Judges KING and BARKSDALE did not participate in the consideration of suggestion for rehearing en banc.

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No. 93-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR LEE H. HENKEL III

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QUESTION PRESENTED

Whether a tort claim that was time-barred by applicable state law prior to its assignment to the federal government remains time-barred in the hands of the FDIC as assignee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-651

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR LEE H. HENKEL III

STATEMENT OF THE CASE

1. *Background.* In 1988, the Federal Home Loan Bank Board determined that two Texas thrifts, City Savings & Loan Association ("City") and Lamar Savings Association ("Lamar"), were insolvent; it appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") to act as their receiver. *Id.* at 3a. Shortly thereafter, "[t]he FSLIC-Receiver sold to the FSLIC, in its corporate capacity, City and Lamar's claims against professionals providing services to these thrifts." *Id.* Petitioner Federal Deposit Insurance Corporation ("FDIC") subsequently acquired those tort claims by

operation of section 401 of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 103 Stat. 354. *Id.*

In 1991, the FDIC brought this action for legal malpractice, acting in its corporate capacity as "manager of the FSLIC Resolution Fund." Pet. 5 n.2. The FDIC alleged that respondent Shrader & York, a law partnership, had been negligent in its representation of the thrifts in connection with five commercial transactions that were completed during the years 1983 through 1985. Specifically, the FDIC contended that Shrader & York negligently failed to advise the thrifts "to obtain regulatory approval" for the transactions, Pet. App. 26a, that the transactions resulted in losses, and that "if Shrader & York had alerted the City and Lamar boards of the illegal nature of the five transactions, the boards would have blocked the transactions, thereby averting [the] losses." *Id.* at 4a. The FDIC did "not allege that Shrader & York committed intentional torts, or conspired . . . to defraud City or Lamar." *Id.* at 25a.[1]

2. *The decision of the district court.* The district court granted summary judgment for the respondents. The court reasoned that Stanley E. Adams, Jr., who directly or indirectly controlled both thrifts and was the "driving force" behind the transactions, had contemporaneous knowledge of the facts relating to the alleged legal malpractice, that his knowledge was properly imputable to the thrifts, and that the causes of action thus had accrued

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[1] The FDIC named respondent Lee H. Henkel III, a partner in Shrader & York, as one of several defendants, apparently on a theory of vicarious liability. The summary judgment proof established that Henkel was not the partner with client responsibility for the thrifts; that he was not materially involved in the representation of the thrifts; that he has no expertise in, and did not advise the thrifts regarding, regulatory matters; that he has no knowledge of any legal advice provided by Shrader & York to the thrifts with respect to the transactions at issue; and that he was not involved in the management of the firm.

no later than 1985. *Id.* at 28a. The court concluded that the claims of legal malpractice had been barred by the applicable Texas two-year statute of limitations no later than 1987, well before the FSLIC and then "the FDIC took over City and Lamar and acquired the claims." *Id.* at 27a.

In response to the FDIC's contention that FIRREA "preempts the Texas statute of limitations and acts to 'revive' the FDIC's claims against the law firm," the district court stated that it had found no "legal authority to support the notion that FIRREA 'revives' barred claims," and that "[i]n the absence of such authority, the Court declines [the FDIC's] invitation to adopt a rule whereby the FDIC's acquisition of a failed institution would revive a claim even though it might be 20 or 30 years old." *Id.* at 28a-29a.

3. *The decision of the court of appeals.* The Fifth Circuit affirmed. The court of appeals, agreeing with the district court, began with the observation that FIRREA "does not revive stale state law claims acquired by the FSLIC or FDIC." *Id.* at 7a. The court therefore reasoned that because "[t]he Texas limitation period for legal malpractice claims is two years," and "the occurrences giving rise to the legal malpractice claims against Shrader & York took place well before May of 1986," the claims all had expired before they were acquired by the FSLIC in "May of 1988 unless one of the equitable doctrines urged upon us by FDIC operates to extend the limitation period." *Id.*

The FDIC's principal argument was that "Texas's discovery rule kept the statute of limitations from running before May of 1988." *Id.* Under that rule, "the statute of limitations for legal malpractice actions does not begin to run until 'the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action.'" *Id.* at 9a, quoting *Willis v. Maverick,* 760

S.W.2d 642, 646 (Tex. 1988). After reviewing the record, the court of appeals concluded that on the facts of this case the Texas discovery rule had not operated to extend the statute of limitations. *Id.* at 10a.

The court of appeals determined that "[t]he summary judgment record demonstrates that Adams was intimately familiar with [the] transactions and knew the facts that the FDIC contends Shrader & York should have cautioned City and Lamar about." *Id.* "Adams should have discovered, through the exercise of reasonable care and diligence, the losses caused by the schemes and the other facts establishing City and Lamar's legal malpractice claims against Shrader & York." *Id.* at 12a. The FDIC argued that Adams had been engaged in wrongdoing and that his "knowledge cannot be imputed to City and Lamar because he acted adversely to their interests." *Id.* at 13a. The court agreed that as a matter of Texas law it would "not impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank." *Id.* at 15a. As to four of the five transactions at issue, however, the court determined that there was no evidence Adams had been acting adversely to the thrifts. *Id.* at 19a-23a. Concerning those four transactions, the court determined that "Adams's knowledge should be imputed to City and Lamar" in accordance with "the generally accepted rule that a bank officer or director's knowledge is imputed to the bank." *Id.* at 12a.

The court of appeals rejected the FDIC's argument that it was entitled to "special status as successor to the FSLIC receiver" and could not be held "to the general rule of imputation." *Id.* at 13a. The court pointed out that the FDIC had brought suit not as receiver but as assignee and that, as a mere assignee, it "could only recover 'those damages potentially available to [its] assignor.'" *Id.* at 14a, quoting *FDIC v. Ernst & Young*, 967 F.2d 166, 169 (5th Cir. 1992). Because the statute

of limitations already had run against the thrifts prior to the assignment of their claims to the FSLIC, "the FSLIC acquired only stale claims." *Id.* at 15a.[2]

The court of appeals agreed with the FDIC that in one of the transactions ("the Brazos merger") Adams may have been acting adversely to Lamar. *Id.* at 23a. But the court explained that even if Adams's knowledge concerning that transaction was not imputable to Lamar, "the record reveals that Lamar's Board of Directors had a considerable amount of concrete information about the Brazos merger that should have put it on notice of potential legal malpractice claims arising out of Shrader & York's work on that merger." *Id.*[3]

REASONS FOR DENYING THE PETITION

The Fifth Circuit correctly decided this case. Its decision does not conflict with any decision of this Court or of any other circuit, and the case does not otherwise warrant plenary review.

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[2] The court of appeals further pointed out that if the FDIC had been acting as receiver rather than as assignee, and thus had stood "in the shoes of depositors and other creditors," it would have had no cause of action at all: "the FDIC has not pled or offered summary judgment evidence that City and Lamar's depositors and other creditors were clients of Shrader & York," and " '[u]nder Texas law, an attorney can be held liable for professional malpractice only to a person with whom the attorney has privity, meaning a client.' " *Id.*, quoting *Thomas v. Pryor*, 847 S.W.2d 303, 304 (Tex. App.—Dallas 1992), *writ granted and judgment vacated*, 37 Tex. Sup. Ct. J. 96 (Nov. 3, 1993).

[3] In view of its disposition of the case, the court of appeals had no occasion to consider respondents' further arguments in support of affirmance. In particular, the court did not rule upon the respondents' contention, grounded in the record, that in connection not only with the Brazos merger but also with the four transactions in which Adams was not acting adversely to the thrifts, the respective boards of directors had known or should have known of the facts relevant to the claims of legal malpractice even apart from Adams's own knowledge.

1. *The decision below is correct.* As amended by FIRREA, section 11 of the Federal Deposit Insurance Act, 12 U.S.C. § 1821, extends the statute of limitations with respect to certain claims asserted by the FDIC as conservator or receiver of the assets of a failed thrift. The Solicitor General, however, apparently concedes that this statutory provision does not act to revive claims that had expired before FIRREA's effective date in 1989. The Fifth Circuit's holding on this point reflected the settled rule that "[i]n the absence of a contrary legislative purpose, 'subsequent extensions of a statutory limitation period will not revive a claim previously barred.'" *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990), quoting *Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 (9th Cir. 1975). Because no such contrary legislative purpose is expressed in FIRREA, the courts that have considered the matter all agree that FIRREA does not operate to revive stale claims. *See, e.g., FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (10th Cir. 1993); *FDIC v. Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2440 (1993). A contrary construction would, as the district court noted, lead to the absurdity that "the FDIC's acquisition of a failed institution would revive a claim even though it might be 20 or 30 years old." Pet. App. 29a.

Consequently, as the Solicitor General apparently recognizes, no federal statute served to extend or toll the operation of the Texas statute of limitations in this case. In these circumstances, the controlling rule of law is that articulated by this Court in *Guaranty Trust Co. v. United States*, 304 U.S. 126, 141-43 (1938): if a claim held by an assignor is time-barred by applicable local law prior to its assignment to the federal government, it remains time-barred in the hands of the United States as assignee. The United States acquires by assignment only "whatever rights then survived the running of the statute against" its assignor. *Id.* at 142. Whether the statute ran against

the assignor prior to assignment is purely a question of state law, and there is no basis for applying federal tolling principles or affording the federal government special protection. *See FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993). This rule has been consistently applied by the circuits in numerous cases involving the FDIC. *See, e.g., Regier Carr & Monroe*, 996 F.2d at 225 ("stale claims may not be revived by transfer to a federal agency"); *FDIC v. Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988) ("If the state statute of limitations has expired before the government acquires a claim, it is not revived by transfer to a federal agency"); *FDIC v. Former Officers & Directors of Metropolitan Bank*, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) (same). *See also Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 619 (5th Cir. 1993).

That really is all this case is about. It is now undisputed that the acts allegedly constituting legal malpractice all occurred, and should have been discovered by the thrifts in the exercise of reasonable care and diligence, more than two years before the thrifts' assets, including tort claims, were assigned to the FSLIC. While still held by the thrifts, the claims of legal malpractice had become time-barred by the Texas two-year statute of limitations. Thus here, as in *Guaranty Trust*, "the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor." *Guaranty Trust*, 304 U.S. at 142. Under the doctrine of *Guaranty Trust*, the claims of legal malpractice remained time-barred in the hands of the FSLIC and the FDIC as the federal assignees.

The Solicitor General misapprehends this central point. He incorrectly characterizes the judgment below as resting on a purported determination "that the knowledge of wrongdoing held by Adams—the principal insider—should be attributed *to the FDIC*." Pet. 6 (emphasis added). The judgment in fact rests on the Fifth Circuit's determi-

nation that "Adams's knowledge should be imputed to *City and Lamar*." Pet. App. 12a (emphasis added). Because Adams's knowledge was attributable to the thrifts more than two years prior to their failure and the resulting assignment of their assets to the FSLIC, the claims had become time-barred before they were assigned. The question whether Adams's knowledge could be attributed to the FDIC is simply not fairly presented on these facts.

To be sure, the FDIC's contentions created some confusion about this point below. The FDIC urged that even when, as in this case, it limits its claims to that of an assignee, it is exempt from "the general rule of imputation." Pet. App. 13a. But that argument, which the court of appeals rejected,[4] was merely a red herring. This case does not turn on the imputation of knowledge to the FDIC. It is sufficient that the thrifts themselves had actual or constructive knowledge bearing upon the claims of legal malpractice and that, as a result, the statute of

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[4] The court explained that it had rejected the argument in *FDIC v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992). The court described *Ernst & Young* as a case where it had held that "the bank officer's knowledge, which would have been imputed to the bank, was imputable to the FDIC." Pet. App. 14a. In actuality, that case, like this one, turned solely on imputation of knowledge to the bank and not to the FDIC. In *Ernst & Young*, the FDIC had brought suit as assignee of an insolvent thrift, asserting a claim against an accounting firm for negligently auditing the thrift; under Texas law, a necessary element of the claim was proof that the thrift had relied upon the audit; the record demonstrated that Jarrett E. Woods, the thrift's chief executive officer and sole shareholder, knew of the thrift's actual financial condition and thus had not relied upon the faulty audit; because Woods was not acting adversely to the thrift's interests, his knowledge was properly attributable to the thrift; consequently, the FDIC was unable to establish a necessary element of its claim. 967 F.2d at 168-72. The court acknowledged that "certain situations require the courts to treat the FDIC differently from other assignees." *Id.* at 169. But the court saw no reason to relieve the FDIC from the burden, which would have been borne by the thrift or any other assignee, of proving every element of its claim. *Id.* at 169-70.

limitations had run prior to the assignment of those claims to the FSLIC. As the Fifth Circuit explained, "[i]f City and Lamar knew what Adams knew, before May of 1986, the FSLIC acquired only stale claims against Shrader & York when it was appointed receiver." *Id.* at 15a. That conclusion follows directly from *Guaranty Trust* and is plainly correct.[5]

2. *There is no conflict.* The Solicitor General contends that the decision below conflicts with the Ninth Circuit's holding "on the same issue" in *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), petition for cert. pending, No. 93-489. Pet. 4. But the cases do not involve the same issue, and there is no conflict on the question actually presented in this case.

In *O'Melveny & Myers* the FDIC, acting in its capacity as receiver (and not just as assignee) of a failed thrift, sued for legal malpractice on the theory that the defendant law firm had failed to make a reasonable investigation when preparing a private placement memorandum on the thrift's behalf. The law firm countered that the thrift itself would have been estopped from asserting such a claim because the thrift's own officers had committed the wrongdoing that the law firm had failed to uncover, and that the FDIC therefore should be estopped as well. The Ninth Circut rejected both halves of this argument: the court reasoned that because the thrift's officers "were acting adversely to [the thrift] and not on its behalf, principles of corporate identity and agency law preclude attribution," and thus the thrift itself would not have been estopped, 969 F.2d at 749-51; and the court held, in the alternative, that even if the officers' conduct had been properly attributable to the thrifts, as a matter of federal common law "equitable defenses good against a bank do not carry over against a bank's receiver." *Id.* at 751.

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[5] Of course, Congress could have changed the rule of *Guaranty Trust*, as applied to cases such as this, when it enacted FIRREA. But Congress chose not to do so.

The differences between this case and *O'Melveny & Myers* are manifest. In *O'Melveny & Myers* the FDIC was acting as receiver and thus as the representative of creditors and depositors; the issue was whether the thrift's own inequitable conduct would bar the FDIC from recovering on the creditors' and depositors' behalf. In contrast, the FDIC in this case is acting on its own behalf as assignee and thus stands in the shoes of the assignor thrifts.[6] The issue here is whether the thrifts' failure to assert their claims within the time allowed by the statute of limitations precludes the subsequent assertion of those stale claims by the FDIC as assignee; this issue, unlike the one in *O'Melveny & Myers,* is squarely controlled by *Guaranty Trust.*

Moreover, on the issue actually involved in this case the Fifth and Ninth Circuits are in complete and express agreement. The Ninth Circuit has made this clear in at least two cases involving the FDIC. In *McSweeney,* the Ninth Circuit expressly stated that "[t]he FDIC may not . . . revive claims for which the state limitations period has expired before the date of federal receivership." 976 F.2d at 534. And in *Former Officers and Directors of Metropolitan Bank,* the Ninth Circuit similarly explained:

> It is settled law that state limitations statutes are relevant in determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency.

884 F.2d at 1309 n.4. The Fifth and Ninth Circuits plainly are not in conflict on this issue.

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[6] The petitioner in *O'Melveny & Myers* incorrectly asserts that in this case, "unlike in *Ernst & Young*, the FDIC purported to sue not only on behalf of the failed bank but also on behalf of depositors and creditors." Pet. 93-489 at 13. In fact, the Fifth Circuit carefully reviewed the record here and determined that on this point this case is "indistinguishable" from *Ernst & Young,* Pet. App. 14a, where the "most significant factor" had been "the FDIC's decision to sue only as . . . assignee." *Ernst & Young,* 967 F.2d at 169.

Nor does the decision below conflict with *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The Solicitor General implies that *D'Oench, Duhme* broadly "requires articulation of uniform rules of federal law that protect federal receivers against claims and defenses that might have been successful against the institution," Pet. 5, but that is incorrect. In *D'Oench, Duhme* and its precursor, *Dietrick v. Greaney*, 309 U.S. 190 (1940), the Court was concerned with the problem created when a bank and an accommodation maker of a note enter into a secret agreement, not reflected on the bank's books, that the note will not be called for payment. The Court identified a federal statutory policy protecting against "misrepresentations as to the securities or other assets in [banks'] portfolios." *D'Oench, Duhme*, 315 U.S. at 457. Accordingly, the Court held that the accommodation maker would not be permitted to assert the secret agreement as a defense "as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements." *Id.* at 458. *See also, e.g., Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). The rule thus applied in *D'Oench, Duhme* and *Greaney* is narrow both in its scope and in its rationale. That rule has nothing to do with the prosecution of routine tort claims of the sort asserted by the FDIC in this case.

Some courts, expanding upon *D'Oench, Duhme*, have reasoned that a uniform federal rule should govern all equitable defenses of "estoppel, waiver, and unjust enrichment" that may be asserted against the FDIC in its capacity as receiver. *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513, 1517 (9th Cir. 1984). That approach, which the Ninth Circuit apparently followed in *O'Melveny & Myers*, extends *O'Oench, Duhme* considerably further than is warranted by its original rationale. But whether or not such an extension of *D'Oench, Duhme* is sound as applied to cases where the FDIC is acting as receiver, it can have no application where, as here, the FDIC is act-

ing solely as assignee. This Court has expressly held that when the federal government acts as a mere assignee, it is subject to the same equitable defenses that would be available against the assignor. *Dietrick v. Standard Surety & Cas. Co.*, 303 U.S. 471, 479-80 (1938). In any event, the issue here does not concern an equitable defense, as in *O'Melveny & Myers*, but the legal defense of limitations. The Solicitor General points to no decision by any court of appeals, and we are aware of none, that ever has gone so far as to read *D'Oench, Duhme* as authorizing or requiring the revival of claims that were time-barred by state law prior to their assignment to the FDIC.

3. *There is no other reason for granting review of this case.* The Solicitor General argues that "the rule of federal law should not permit tortfeasors to escape liability because insiders of the failed institution were aware of . . . the wrongdoing." Pet. 5. As a general proposition, that seems plainly incorrect. The very essence of a statute of limitations is that tortfeasors may indeed escape liability if the injured person was aware of the wrongdoing and failed to bring suit. "These enactments are statutes of repose; . . . they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Of course, there are circumstances in which an insiders' awareness of a third party's wrongdoing cannot fairly be imputed to the institution; as the Fifth Circuit recognized, it may well be improper to "impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank." Pet. App. 15a. But that consideration does not require or justify the introduction of novel rules of federal common law. By denying any imputation of knowledge when the knowledgeable insider has acted adversely to the institution, and by thus tolling the statute of limitations,

"Texas's discovery rule adequately addresses the FDIC's policy concerns." *Id.* at 25.

Finally, it is telling that the Solicitor General does not claim that the narrow issue actually involved in this particular case is common or recurrent. To the contrary, he concedes that "the equitable defense context in which the issue of attribution arises in *O'Melveny & Myers* is more common in pending litigation than is the statute of limitations context in which it arises here." Pet. 8. Moreover, in those instances in which the FDIC has sought to assert time-barred claims, the circuits consistently have held, as the Fifth Circuit did here, that such claims may not be revived through the legerdemain of federal common law. *See* p. 7, *supra*. In short, this is neither an important issue nor one on which the lower courts stand in need of guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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QUESTION PRESENTED

The FDIC has phrased the question presented as one involving the imputation of knowledge of a "malfeasant insider" to the FDIC. If that is the question the FDIC seeks to present to this Court, the petition should be summarily denied; that issue is simply not presented by this case. The true question presented below was simply whether a state law claim for negligence was barred under state law principles of limitations before the FDIC acquired the claim. The Fifth Circuit held that the claim was, and its decision presents no novel theory nor any departure from established precedent. There was no issue of imputation of knowledge to the FDIC; instead, the case dealt with the imputation of a managing agent's knowledge to Texas corporations to determine if, under the Texas "discovery rule," the claims were time-barred before the FDIC acquired them.

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ABBREVIATIONS USED IN THE BRIEF

The following abbreviations are used throughout the brief:

FDIC	Federal Deposit Insurance Corporation
Pet.	The FDIC's petition for writ of certiorari
App.	Appendix attached to the FDIC's petition
App. II	Appendix attached to this brief
FIRREA	Financial Institution Reform, Recovery and Enforcement Act of 1989
Shrader & York	Refers to all respondents on whose behalf this brief is filed

STATEMENT

Lamar Savings Association and City Savings & Loan Association, two state-chartered thrifts, were declared insolvent on May 18, 1988 by the Federal Home Loan Bank Board. Pet. at 2. The FDIC commenced this suit against Shrader & York on May 17, 1991, one day short of three years later, and alleged that Shrader & York committed malpractice in connection with five separate commercial transactions which took place in 1983 and 1985. App. at 2a, 26a-27a. Suit was filed by the FDIC in its corporate capacity as the successor-in-interest of the assignee of the thrifts' claims. App. at 3a, 6a. Shrader & York moved for summary judgment on several grounds including the defense of limitations and the lack of cognizable legal damage. *Id.* at 2a.

In the district court, the FDIC initially asserted that FIRREA preempted the Texas law of limitations and revived the claims. App. at 28a. The FDIC also invoked the Texas discovery rule, and in addition, urged the court to adopt as Texas law the equitable tolling concept of

"adverse domination." App. at 7a-8a, 28a. The district court quickly disposed of the revival argument as being unsupported by any legal authority. App. at 28a. Regarding the discovery rule, the district court analyzed the evidence before it and determined that Stanley Adams, a principal in both thrifts and, according to the FDIC, the "driving force" behind the five transactions, knew or should have known sufficient facts to commence the running of limitations, and that his knowledge was properly imputed to the thrifts. *Id.* The trial court also ruled that the FDIC had failed to show that the concept of adverse domination had any bearing to the case. App. at 29a. Finally, the trial court ruled that the FDIC had failed to establish proximately caused damage. *Id.*

In the Fifth Circuit, the FDIC abandoned its revival argument and focused only on the Texas discovery rule and the concept of adverse domination. App. at 7a-8a. Analyzing the record before it, the Fifth Circuit concluded that the FDIC failed to establish that the discovery rule kept the statute of limitations from expiring before May of 1988. App. at 10a.

The FDIC's arguments to the contrary were simply not supported by the summary judgment record. Indeed, the Fifth Circuit's opinion repeatedly recites the inadequacy of the FDIC's proof on the imputation issue as a basis for the decision. For example, the FDIC argued that Adams' knowledge should not be imputed to the thrifts because he was acting adversely to them. App. at 15a. As the Fifth Circuit noted, however, regarding four of the five transactions, that argument entailed the FDIC's demonstrating that Adams acted entirely for his own purposes. App. at 15a-19a. It failed to do so: "[T]he FDIC did not offer summary judgment evidence that Adams embezzled, looted or otherwise personally profited at the expense of City or Lamar. . . ." App. at 19a. Regarding the fifth transaction, the court also found that, regardless of Adams' knowledge, the Lamar Board of Directors had

"a considerable amount of concrete information about the Brazos merger that should have put it on notice of potential legal malpractice claims. . . ." App. at 23a.

Each of the five transactions was examined by the Fifth Circuit, and the evidence was found lacking:

> An examination of the individual transactions reveals the inadequacy of the FDIC's summary judgment evidence on this issue. App. at 20a.
>
> The FDIC does not present evidence raising a fact question of whether Adams personally profited from City getting a bad deal on RDC. *Id.*
>
> [T]he FDIC has not produced summary judgment evidence that the transaction left City undercapitalized. *Id.*
>
> Again the FDIC fails to offer evidence that Adams personally profited from this [8214 Westchester] transaction at Lamar's expense. App. at 21a.
>
> The FDIC also fails to meet its burden with respect to Lamar's direct investments into CTC and Stone Oak. *Id.*
>
> [T]he summary judgment evidence indicates that any fraudulently inflated profits went on the books of Lamar and City, not into Adams' personal account. App. at 19a.

Similarly, the FDIC's alternative arguments were not supported by the summary judgment record. The FDIC argued that Shrader & York was not an innocent party and was therefore not entitled to the benefit of the imputation rule, but "[t]he FDIC has not alleged or produced summary judgment evidence that Shrader & York colluded with Adams, or that it did so to defraud City and Lamar." App. at 22a-23a. The FDIC argued that, because it was suing also on behalf of depositors and creditors, it was entitled to special treatment, but "the FDIC has not pled or offered summary judgment evidence that City and

Lamar's depositors and other creditors were clients of Shrader & York, and thus able to sue Shrader & York for professional malpractice." App. at 15a.[1]

Based on the record before it, the Fifth Circuit affirmed. App. at 10a. Recognizing that FIRREA did not revive the claims, the Fifth Circuit correctly analyzed and applied Texas law to determine that the claims were time-barred before they were acquired by the FDIC. App. at 7a-9a.

REASONS FOR DENYING THE PETITION

1. The petition should be denied because the Fifth Circuit's decision is founded, and can be upheld, on the basis of existing and unquestioned Supreme Court precedent. This Court held long ago that a claim barred under state law before acquisition by a governmental agency was not revived upon acquisition. Both the Fifth and Ninth Circuits have followed and applied that precedent, and there simply is no conflict on the pertinent issue—the viability of stale state law claims assigned to the FDIC. In this case, the Fifth Circuit followed precedent, examined Texas law, and determined that a Texas tort claim was time-barred prior to its acquisition by the FDIC. The decision involved no novel legal concept.

The Fifth Circuit's decision is not in conflict with any decision of the Ninth Circuit on the same issue. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3275 (U.S. Sept. 27, 1993) (No. 93-489) (hereafter cited as *O'Melveny*), does not pertain to the FDIC's acquisition of stale claims. *O'Melveny* addresses the question of what substantive defenses may be available to defeat the merits of admittedly viable state claims assigned to the FDIC. The alternative holdings of *O'Melveny*, namely, that California law would

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[1] Another difficulty with this argument was the inaccurate premise; the FDIC actually had not alleged any claims on behalf of depositors and creditors, and, in the trial court, had never urged that it was acting on their behalf.

not impute acts of wrongdoing insiders to a California corporation, and, alternatively, that the equitable defense of unclean hands could not be applied to the FDIC, are not, and cannot be, in conflict with the Fifth Circuit's interpretation of the Texas law of limitations. This case involves no imputation of knowledge to the FDIC; the imputation issue properly decided below dealt only with the application of the Texas "discovery rule" in the limitations context to determine if the claims were time-barred before the FDIC acquired them.

2. The petition should be denied because the Fifth Circuit's decision affirming summary judgment can be upheld purely on procedural and evidentiary grounds. As the Fifth Circuit repeatedly noted, the FDIC failed to carry its summary judgment burden. The arguments now advanced by the FDIC should not be considered by this Court because the FDIC failed to establish the underlying factual basis for its legal arguments.

3. The petition should be denied because it seeks to present to this Court an issue that was neither fairly raised nor in fact addressed in the courts below. The FDIC focused its arguments in the courts below on the application of Texas law. It never suggested that either the trial court or the Fifth Circuit should create federal common law and apply it retroactively to determine whether limitations expired on a state law claim while it was still owned by a state-created entity.

4. The petition should be denied because the decision can be affirmed on a basis, which, although not addressed by the Fifth Circuit, was correctly relied upon by the district court. Specifically, the FDIC failed to show that the alleged acts of malpractice proximately caused any recoverable damage; under clear Fifth Circuit precedent, causing a party to enter into a transaction, or as here failing to deter a party from entering into a transaction, that loses money does not make the procuring party

liable for the transactional loss. The trial court therefore correctly concluded that summary judgment was proper because the FDIC had failed to adduce any summary judgment evidence of damages.

I. THE DECISION IS BASED ON ESTABLISHED PRECEDENT HONORED IN THE FIFTH AND NINTH CIRCUITS, AND THERE IS NO CONFLICT WITH *O'MELVENY*

The stated basis for the petition is that the Fifth Circuit's decision conflicts with the Ninth Circuit's in *O'Melveny*. That is inaccurate, and the conflict is contrived. *O'Melveny* addresses the question of what substantive defenses are available to defeat a claim that was admittedly viable when assigned to the FDIC. This case, however, turns on whether any viable claim existed to be assigned to the FDIC.

In *Guaranty Trust Co. v. United States,* 304 U.S. 126 (1938), this Court held that a claim, time-barred under the state law that created it, is not revived by subsequent assignment to a federal agency: The federal agency "never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid." *Id.* at 142. It is now "settled law" that a federal court, when presented with the question of the viability of a claim assigned to the FDIC, must determine whether, under state law, limitations expired before transfer to the agency. *FDIC v. Former Officers and Directors of Metropolitan Bank,* 884 F.2d 1304, 1309 at n.4 (9th Cir. 1989) (citing and quoting *Guaranty Trust*), *cert. denied sub nom, Lee v. FDIC,* 496 U.S. 936 (1990); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir. 1993) (The "issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver.").

Contrary to what the FDIC's petition seems to suggest, this case presented no occasion for the Fifth Circuit to consider fashioning or interpreting federal common law. The pertinent issue was purely a question of state law. The rights asserted by the FDIC, as admitted assignee of Texas corporations, were created by Texas law, and the simple question was whether Texas law extinguished those rights prior to the assignment.

To decide the case, the Fifth Circuit analyzed and applied Texas limitations law, including its principles of claim accrual under the "discovery rule" and state concepts of "tolling." In its petition, the FDIC does not assail the circuit court's interpretation of Texas law. Instead, it argues that the knowledge of "wrongdoing insiders" had been "imputed" to the FDIC. That is not the case. The Fifth Circuit merely concluded that under Texas law, Texas corporations were on notice of what their managing agents knew or should have known. The court then determined when that knowledge was acquired, applied the Texas two-year statute of limitations to that date, and found that limitations expired while the claim was owned by the Texas institutions. Imputation, in the sense the FDIC uses the term in its petition, had no role to play in the analysis.

Nevertheless, seizing on the fact that the word "imputation" appears in the text of the opinion and, as well, in *O'Melveny*, the FDIC seeks to create conflict where none exists. The central question in this case was when and under what circumstances are Texas corporations charged with the knowledge held by managing agents. To the extent imputation was an issue, it was merely one of imputation to the institutions while they owned the claims.

O'Melveny, on the other hand, involved no question of limitations. The claim of conflict is predicated on the Ninth Circuit's alternative holding that, when the FDIC as receiver acquires a claim, the determination of what

substantive defenses can be interposed to defeat the merits of that claim is a question of federal law. *O'Melveny*, 969 F.2d at 751.[2] Without regard to whether that proposition is correct, it has no application to the issue presented here—whether a viable claim was ever acquired by the FDIC. That is a question controlled by state law.

The FDIC's misplaced invocation of the *D'Oench, Duhme*[3] doctrine not only fails to support a claim of conflict between the Fifth and Ninth Circuits, it undermines the FDIC's argument. Certainly *D'Oench, Duhme* can be invoked to defeat substantive defenses that would be available in a suit brought by an institution prior to its failure. *O'Melveny* involved such a substantive defense, and its reliance on *D'Oench, Duhme* was tenable. However, neither *D'Oench, Duhme*, nor its progeny, nor its statutory codification, 12 U.S.C. § 1823(e), can be extended beyond substantive defenses to displace state law on limitations and revive a debt that was barred before that institution's failure. No case has ever held, nor has any commentator suggested, that the *D'Oench, Duhme* doctrine revives time-barred claims. Thus, for example, when a federal court dismisses an FDIC suit based on a promissory note time-barred because a negligent or defalcating loan officer did not obtain a timely renewal, the misconduct of that loan officer is not being "imputed" to the FDIC. State law is merely being applied to a state law question. Likewise, in this case, no misconduct is being "imputed" to the FDIC.

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[2] *O'Melveny*'s discussion of the FDIC as receiver is inapposite in any event because here the FDIC is not suing in the capacity of a receiver. As the Fifth Circuit noted, the FDIC was merely the successor-in-interest of the assignee of state law claims owned by the institutions. App. at 3a, 6a. While the FDIC asserts that this is irrelevant (Pet. at 5, n.2), it is another example of an attempt to create conflict where there is none.

[3] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

Decisions of the Ninth Circuit involving limitations are in complete harmony with the decision in this case. Indeed, in a recent opinion the Ninth Circuit stated:

> It is settled law that state limitations statutes are relevant to determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired, that claim is not revived by transfer to a federal agency.

FDIC v. Former Officers and Directors of Metropolitan Bank, 884 F.2d at 1309 n.4; *accord, FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993) ("The FDIC may not, however, revive claims for which the state limitations period has expired before the date of federal receivership.").[4] Therefore, if the issue in this case had been presented to the *O'Melveny* court, *Metropolitan Bank* and *McSweeney* would have dictated a result precisely the same as that reached by the Fifth Circuit. *See McSweeney*, 976 F.2d at 535 (Ninth Circuit panel must follow precedent established by prior panel).

The Fifth Circuit's decision is therefore correctly founded on precedent of this Court. There is no conflict between the circuits on any issue germane to this case, and the petition should therefore be denied.

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[4] That this principle is "settled law" is surely correct. *See FDIC v. Hinkson*, 848 F.2d 432, 434 (3rd Cir. 1988) ("If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency."); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (10th Cir. 1993) (agreeing with *Hinkson*); *FDIC v. Dawson*, 4 F.2d 1303 (5th Cir. 1993) (FIRREA "has been interpreted not to revive stale state law claims acquired by the FDIC."); *FDIC v. Belli*, 981 F.2d 838, 842-43 (5th Cir. 1993); *Randolph v. RTC*, 995 F.2d 611, 619 (5th Cir. 1993) ("[W]e . . . have ruled that FIRREA does not revive stale claims.").

II. PROCEDURAL AND EVIDENTIARY ISSUES RENDER THE PETITION UNWORTHY

The FDIC's petition states that this case presents an issue of "fundamental importance" to the nation's regulators. Pet. at 4. Respondents disagree. Despite the hyperbole, this case was correctly resolved and affirmed on summary judgment procedure and proof. As this Court has stated, once a summary judgment movant has shown the absence of a material fact dispute, the burden shifts to the non-moving party to produce summary judgment evidence designating "specific facts establishing an issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Here, the Fifth Circuit carefully analyzed the record and determined that the FDIC had not carried its burden.

In the trial court and the Fifth Circuit, the FDIC relied on the Texas "discovery rule" to argue that limitations had not expired before the FDIC acquired the claims. Under that rule, the limitations period does not begin to run until the claimant discovers, or should have discovered through the exercise of reasonable care and diligence, the facts establishing the elements of the claim. The burden of proving that the discovery rule delayed accrual was on the FDIC. App. at 8a (citing *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 518 (Tex. 1988)). Under federal summary judgment procedure, therefore, the FDIC was required to adduce sufficient proof to establish the existence of material fact issues regarding the application of the discovery rule and the delayed accrual of the claims. App. at 9a.

The evidence submitted in the court below established that Stanley Adams, a principal in both thrifts, knew or should have known sufficient facts to commence the running of limitations, and that his knowledge was properly imputed to the thrifts. The FDIC itself had characterized Adams' conduct as deliberate and knowing, so it was obviously difficult to contend that he had no knowledge.

Nonetheless, the FDIC argued that Adams' knowledge should not be imputed to the thrifts because he was acting adversely to the thrifts. To succeed on that argument, however, the FDIC was required to demonstrate through summary judgment proof that Adams acted entirely for his own purposes. The FDIC failed to do so. As the Fifth Circuit noted, regarding four of the five transactions, the FDIC simply did not offer summary judgment evidence to support its factual arguments. App. at 19a. Regarding the fifth transaction, the court also found that the summary judgment evidence established that the board had sufficient information to commence the running of limitations. App. at 23a.

Notwithstanding the knowledge of Adams, the FDIC still failed to carry its burden. Under Texas law, when any disinterested officer or director has notice of a claim, limitations begins to run on a claim owned by a corporation. *International Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 580 (Tex. 1963). The FDIC failed to offer summary judgment evidence sufficient to raise a material issue of fact on this fundamental element of its claim. Indeed, there was no evidence offered regarding the actual or constructive knowledge of any officer other than Adams. The FDIC did submit affidavits of two directors stating that the two of them did not have actual knowledge of the claims. Those affidavits, however, did not suggest, much less establish, that other directors had no knowledge, and the FDIC introduced no evidence to satisfy its burden of disproving actual or constructive knowledge of the numerous other directors. Thus, regardless of the imputation of Adams' knowledge, the FDIC failed to satisfy its summary judgment burden that no disinterested officer or director had actual or constructive knowledge of the claim. The petition should therefore be denied because the FDIC failed to establish a factual predicate to support the presentation of its claim that only the knowledge of Adams had been imputed. The FDIC's unsuccessful invocation of the dis-

covery rule mandated summary judgment and required that the judgment be affirmed.

The Fifth Circuit correctly ruled that, based on the record before it, the FDIC had the burden of producing summary judgment evidence in support of its limitations arguments and that it did not carry that burden. The petition simply ignores the summary judgment record and requests this Court to do the same. The FDIC failed to carry its summary judgment burden of proof, its evidence was deficient, and the legal arguments it desires to advance at this point have no factual underpinning. For that reason alone, the petition should be denied.

III. THE QUESTION PRESENTED NOW WAS NOT FAIRLY PRESENTED IN THE COURTS BELOW

The petition states that the issue presented is whether the knowledge of a "malfeasant insider" should be imputed to the FDIC. To the extent this can be characterized as an issue in this case, it was not an issue that can be fairly said to have been raised in the courts below.

In the trial court, the FDIC made three arguments in opposition to Shrader & York's contention that all claims were barred by limitations prior to acquisition by the agency: (1) that FIRREA revived stale claims, (2) that the causes of action were not barred under Texas statutes of limitations on the date the FDIC acquired them and, (3) that the so-called "adverse domination doctrine" tolled the running of the Texas statute. Both its second and third responsive arguments were premised entirely on Texas law.

At no time in the trial court did the FDIC contend that application of the Texas discovery rule would result in "imputation" to it of the knowledge of "wrongdoing insiders." In fact, the FDIC's arguments were precisely to the contrary. The FDIC filed two briefs opposing summary judgment, and, in both, argued that, if stale

claims were not revived by FIRREA, then a "two step analysis" should be undertaken. Under this procedure, the trial court "must first determine whether the applicable Texas limitations periods had expired before the FDIC acquired the state law causes of action it alleges here. . . ." App. II at 8a. *See also* App. II at 6a: The "first issue is whether the applicable state limitations period had expired when the FDIC acquired the claim for malpractice." The FDIC therefore clearly recognized that the issue was purely one of state law.

On appeal to the Fifth Circuit, the FDIC abandoned its FIRREA revival argument, and stated that the issue on appeal was whether the trial court "erred in not tolling the statute of limitations under the discovery rule or the doctrine of adverse domination." App. II at 2a. Again, the focus was on the application of Texas state law, with one minor exception.

In a one-page segment of its fifty-page brief, the FDIC cited authority for the proposition that when a receiver owns claims of creditors, it may sometimes assert the creditors' claims. This, the FDIC argued, justified the disregard of knowledge imputable to the institutions. Of course, to the extent the receiver is bringing claims "in the right" of creditors, knowledge of the corporation is immaterial to the running of limitations on those claims. The problem with this theory, however, was that it was purely an abstract statement; here, the FDIC was not the receiver, and it had alleged no claims that were owned by shareholders or creditors.

The FDIC never articulated the argument, subsumed in its erroneous statement of the issue presented here, that federal common law can be created retroactively and applied retroactively to determine whether limitations expired on a state law claim while it was owned by a state-created corporate entity. That argument was not suggested, much less briefed, to the trial court, and it was not fairly presented to the circuit court. Indeed, the

FDIC's primary argument in the Fifth Circuit was that, under Texas law, the knowledge of the wrongdoing insider was not imputable to the failed institutions. The FDIC conceded that, if the claim were barred based on the imputation of knowledge to the thrift, it remained barred if brought by the FDIC. App. II at 6a, 8a. The issue of "imputing knowledge to the FDIC," as opposed to imputing knowledge to the institutions to determine if the claims were time-barred, was simply not fairly presented to the courts below. Because of that failure, the FDIC cannot claim that its petition deserves the attention of this Court.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE FDIC FAILED TO ALLEGE OR OFFER PROOF OF PROXIMATELY CAUSED DAMAGES

The petition should be denied for the additional reason that the Fifth Circuit's decision can be upheld solely on the basis that the FDIC failed to establish a prima facie case. Just as it failed with regard to the discovery rule, the FDIC introduced no evidence of damages proximately caused by the alleged negligence, and the trial court found the lack of such evidence to be an additional ground for summary judgment. While the Fifth Circuit did not address this ground, the record before it was sufficient to justify affirmance of the trial court. The FDIC's failure to establish the damage element obviates the need to consider the arguments in its petition.

An essential element of a negligence claim under Texas state law is that the plaintiff sustained damage proximately caused by the conduct. *Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 376 (Tex. 1984). As the trial court held, the FDIC, in response to Shrader & York's motion, offered no evidence of losses proximately caused by the alleged malpractice. App. at 29a.

The FDIC chose to rely merely on its allegations, claiming that any loss on the loan transactions was recoverable.

At best, the FDIC alleged only "transaction causation," but that is plainly insufficient: "[C]ausing a party to enter a transaction that loses money does not make the procuring party liable for the transactional loss." *Huddleston v. Herman & MacLean,* 640 F.2d 534, 555 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983). "Loss causation" is required because it proves that the conduct "touches upon the reasons for the investment's decline in value." *LHLC Corp. v. Cluett, Peabody and Co.,* 842 F.2d 928 (7th Cir.), *cert. denied,* 488 U.S. 926 (1988).

As might be expected, the distinction between transaction and loss causation has often been noted in securities fraud cases, where the plaintiff must prove both. *Arthur Young and Co. v. Reves,* 937 F.2d 1310, 1328 (8th Cir. 1991), *cert. granted,* 112 S.Ct. 1159 (1992), *cert. denied,* 112 S.Ct. 1165 (1992), and *aff'd* 113 S.Ct. 1163 (1993). However, loss causation is not peculiar to securities fraud cases; it is a fundamental precept of the common law of torts:

> Indeed what securities lawyers call "loss causation" *is* the standard common law fraud rule . . ., merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation.

Bastian v. Petren Resources Corp., 892 F.2d 680, 683-84 (7th Cir.) (citation omitted), *cert. denied,* 496 U.S. 906 (1990). In this case, the FDIC admittedly did not seek to allege or prove loss causation, an essential element of its claim. Summary judgment based on that failure alone was clearly proper, and the petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpted Portions of Brief of Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6315

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY
Plaintiff-Appellant,

-against-

SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS, & GROTE, P.C., Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS & GROTE, P.C.; and WILLIAM E. YORK; WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; DOUGLAS A. PAISLEY II; and J.D. PAGE
Defendants-Appellees.

On Appeal from the United States District Court
of the Southern District of Texas
Houston Division

BRIEF OF APPELLANT

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* * * *

STATEMENT OF THE ISSUES

1. The district court erred in dismissing the FDIC's suit for lack of standing.

2. The district court erred in not tolling the statute of limitations under the discovery rule or the doctrine of adverse domination.

3. The district court erred in dismissing FDIC's suit for malpractice under a proximate cause test for securities cases based on fraud or deceit.

4. The district court erred in holding that a law firm's general partner who receives benefits from a contract has no personal liability regarding the contract.

* * * *

The district court erroneously concluded that the statute of limitations had expired by inferring that Adams' control of Lamar and City provided him with knowledge of S&Y's malpractice, and that Adams' knowledge could be imputed to the thrifts to start the running of the statute of limitations. The district court ignored the requirements of Texas law that mandate that a statute of limitations can only begin to run when a disinterested corporate official discovers facts establishing the elements of the malpractice claim. S&Y never demonstrated that Adams was disinterested or that he knew of the facts establishing S&Y's malpractice. Accordingly, summary judgment was inappropriate.

Furthermore, the district court erred in imputing Adams' knowledge to Lamar and City. This imputation was wrong not only because Adams' acts were adverse to Lamar and City, but because the FDIC, as statutory representative of the institution and its creditors, is not bound by the wrongful acts of the thrifts and their officials. Moreover, only innocent parties are entitled to impute the knowledge of the agent's misconduct to the principal; here, S&Y is clearly not an innocent party for it failed in its duty to protect the thrifts from Adams'

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misconduct. Lawyers who breach their obligations should not be shielded from accountability by legal formulations, such as imputation, or inferences drawn from the misconduct of a client's officer.

Additionally, the district court erred in not tolling the statute under the doctrine of adverse domination. Under the doctrine, the courts have held that the statute of limitations for claims against wrongdoing corporate officials is tolled until they relinquish control of the institution. Moreover, because management cannot be expected to sue those outsiders that might focus attention on their own wrongdoing, the doctrine has been applied to claims against outside professionals such as lawyers and accountants.

The district court erred in holding that the FDIC failed to show that S&Y's malpractice proximately caused losses to Lamar and City. The court mistakenly based its holding on a proximate cause analysis only relevant to federal securities law fraud claims, which has no relation to an attorney malpractice action. Under Texas law, attorney malpractice sounds in negligence, and under Texas negligence law, causation exists if S&Y's conduct was a substantial factor in bringing about the damages suffered by the thrifts. Under the facts submitted by the FDIC, S&Y's conduct clearly brought about these damages. For example, in three of the transactions described in the complaint, S&Y did not inform the Lamar board of directors that the transactions violated federal law. Armed with proper advice, the directors would not have approved and this would have stopped the losses. S&Y's negligence was a substantial contributing factor to the losses Lamar suffered on these transactions.

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B. The District Court Erred In Imputing Any Knowledge Adams May Have Had About S&Y Activities To Lamar And City, And Thus To FDIC

1. *Imputation Is Inappropriate Against FDIC As Successor To FSLIC As Receiver.*

Here, the FDIC, as successor to FSLIC as receiver for Lamar and City, is expressly granted the rights to assert claims on behalf of the thrift and its creditors. 12 C.F.R. § 549.3(a); 12 C.F.R. § 548.2(f) ("[The Receiver may] in every way . . . represent the association, its members and creditors") (regulations in effect when receiver was appointed for Lamar and City). Further, pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC has the authority to represent the rights of the institution, and of any stockholder, member, accountholder, depositor, officer or director of such institution holding his or her deposits. A receiver is not bound by the wrongful acts of its predecessor when it has a statutory mandate to assert claims not only on behalf of the failed institution, but also on behalf of creditors whose rights it obtained by operation of law. *Lank v. New York Stock Exchange*, 548 F.2d 61, 67 (2d Cir. 1977) ("where [a receiver] represents the creditors as well as the estate, he may sometimes sue in that right where the estate could not.)" [20]

FDIC sues wrongdoers who cause losses at federally insured banks and thrifts that have failed to enrich the receivership estate, or if the claim has been assigned to the Corporation, to recover for the Insurance Funds, thereby benefiting depositors and creditors. Because of this FDIC fits within an established exception to the general rule that the assignee is bound by the acts of its predecessor. Accordingly, as a matter of federal law Adams' actions or knowledge should not be imputed to the FDIC to trigger the running of the statute. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). The district court's decision imputing Adams' knowledge to the FDIC should be reversed.

Excerpted Portions of the Memorandum of Points and Authorities in Support of the FDIC's Opposition to Shrader & York's Motion for Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-91-1372

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC RESOLUTION FUND, Statutory Successor to the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, In Its Corporate Capacity

Plaintiff,

vs.

SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C. Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS AND GROTE, P.C. Successor Organization to SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C.; WILLIAM E. YORK, WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; and DOUGLAS A. PAISLEY II

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE FDIC'S OPPOSITION TO SHRADER & YORK'S MOTION FOR SUMMARY JUDGMENT

* * * *

2. *If a two-step analysis is used, the result is the same.*

Prior to FIRREA, some courts used a two-step analysis. See *FSLIC v. Williams,* 599 F. Supp. 1184 (D. Md.

1984); *FDIC v. Buttram,* 590 F. Supp. 251 (N.D. Ala. 1984). The Defendants will assert that that is the proper standard. The FDIC disagrees but, as shown below, the result is the same. The action was filed timely.

Under the two-step analysis, the first issue is whether the applicable state limitations period had expired when the FDIC acquired the claim for malpractice. The second step is whether the claim was brought within the federal limitations period after it was acquired by the FDIC.

* * * *

Excerpted Portions of the Supplemental Response of the FDIC in Opposition to the Motion of Shrader & York, *et al.* for Summary Judgment, or, to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Response of the FDIC in Opposition to the Supplemental Motion of Paul D. Clote, Gary E. Grote and Eldon Hinds for Partial Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-91-1372

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC RESOLUTION FUND, Statutory Successor to the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in Its Corporate Capacity

Plaintiff,

vs.

SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS, AND GROTE, P.C. Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS AND GROTE, P.C.; WILLIAM E. YORK, WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; and DOUGLAS A. PAISLEY II

Defendants.

SUPPLEMENTAL RESPONSE OF THE FDIC IN OPPOSITION TO THE MOTION OF SHRADER & YORK, ET AL. FOR SUMMARY JUDGMENT, OR, TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND RESPONSE OF THE FDIC IN OPPOSITION TO THE SUPPLEMENTAL MOTION OF PAUL D. CLOTE, GARY E. GROTE AND ELDON L. HINDS FOR PARTIAL SUMMARY JUDGMENT

* * * *

2. *In The Alternative, Under A Two-Step Analysis, The FDIC's Action Is Timely Filed.*

Under a two-step analysis, the Court must first determine whether the applicable Texas limitations periods had expired before the FDIC acquired the state law causes of action it alleges here, and, if not, whether the applicable federal limitations period expired between the date the FDIC acquired the action and the date it filed suit. *See FDIC v. Howse,* 736 F. Supp. 1437, 1440 (S.D. Tex. 1990).

* * * *

1993

No. 93-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR J. D. PAGE

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QUESTIONS PRESENTED

This is a summary judgment case. The Federal Deposit Insurance Corporation ("FDIC") brought an action against respondents for negligence in connection with two failed savings associations. The FDIC contended that if the respondents had warned the savings associations about five different transactions, the transactions would not have taken place, and that the savings associations would not have suffered putative losses. The respondents moved for summary judgment based on the grounds that the causes of action were barred by limitations and that the respondents' alleged actions were not the proximate cause of any damage. The questions presented to the Court -- any one of which answered in the affirmative should dictate the denial of the petition for a writ of certiorari -- are as follows:

1. Whether the FDIC met its burden of proof in responding to the respondents' motions for summary judgment.

2. Whether a state law claim for negligence that was time-barred by the applicable state statute of limitations prior to its assignment to the FDIC is revived by Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1821 *et seq.* ("FIRREA").

3. Even if the FDIC had acquired a negligence action as to which limitations had not yet run, whether the FDIC sued the respondent Page within the three year limitations period allowed by FIRREA.

LIST OF PARTIES

Respondents are Shrader & York, a Texas partnership in dissolution; Shrader, York, Clote, Hinds & Grote, P.C., successor organization to Shrader & York; Shrader, Clote, Hinds & Grote, P.C.; William E. York; William C. Shrader; Paul D. Clote; Gary E. Clote; Eldon L. Hinds; Lee H. Henkel, III; and -- to the extent that he has been properly brought before the Court -- J. D. Page.

ABBREVIATIONS USED IN THIS BRIEF

The following abbreviations are used throughout the brief:

FDIC	Federal Deposit Insurance Corporation
Pet.	The FDIC's petition for writ of certiorari
Pet. App.	Appendix attached to the FDIC's petition
Resp. App.	Appendix attached to this brief
FIRREA	Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821 *et seq.*

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This case has been and may again be properly disposed of on simple procedural grounds. 10

The FDIC failed to raise an issue of fact as to whether the respondents' alleged acts proximately caused the financial loss complained of by the FDIC. 11

This case may be disposed of as to Page because he has not been properly brought before the Court. 12

This case may be disposed of as to Page because he was not sued within the three year limitations period allowed for actions which are not barred by limitations when acquired by the FDIC. 13

The Fifth Circuit correctly decided this case based on the record before it and the pertinent Texas law which both the FDIC and the respondents agreed controlled. 13

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-651

FEDERAL DEPOSIT INSURANCE CORPORATION,

Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR J. D. PAGE

STATEMENT OF THE CASE

1. *Background.* In May 1991, the FDIC sued the respondents (other than Page) for their alleged negligence in connection with five different transactions involving Lamar Savings Association ("Lamar") and City Savings Association ("City"). The FDIC had taken over the failed institutions in

May 1988. *Pet.* at 2. According to the FDIC, the transactions in issue took place as follows: (1) Realty Development Corporation ("RDC"): January 1983; (2) Brazos Savings Association: July 1983; (3) 8214 Westchester: December 1984; (4) CTC (USA) Corporation: May 1985; and (5) Stone Oak: 1985. *Pet. App. A* at 2a. The FDIC alleged that Shrader & York failed to advise the corporations to obtain regulatory approval for the transactions, *Pet. App. B* at 26a, that the transactions resulted in losses, and that if the corporations' boards has been so advised of the illegal nature of the five transactions, the boards would have blocked the transactions. *Pet. App. A* at 4a.

2. The FDIC brought this action in its corporate capacity as "manager of the FSLIC Resolution Fund." Pet. 5 n.2. The FDIC sued to recover for putative injuries to Lamar and City; the FDIC did not contend that it was injured, and did not seek to prove an injury to any individual or entity other than the defunct corporations.

3. The FDIC alleged in the courts below, with no apparent embarrassment at the inconsistency, both (1) that at the time the respondents allegedly failed to warn the corporations' boards about the transactions, and (2) that the corporations were dominated and controlled by Stanley Adams and that Adams contrived and fully comprehended the transactions. *Pet. App. A* at 11a, 12a.

4. In *Lamar v. Adams, et al.*, in the United States District Court for the Western District of Texas, the FDIC had sued Stanley Adams and others for damages for fraud arising out of their control of Lamar and City. The FDIC's civil complaint against Adams establishes not only that Adams was not misled in any way by the respondents, but to the contrary that he knew full well the financial condition of Lamar and City. The FDIC contended that Adams eventually worsened the condition by fraudulently operating Lamar and engaging in risky and improper lending practices. *Pet. App. A* at 11a.

5. Further, the pleadings in *Lamar v. Adams* clearly stated that as early as April 1983, the corporations' outside auditors were aware of and had given sufficient notice to the Lamar and City boards of directors of significant problems with at least one of the transactions in question in the case at bar -- the June 1983 Brazos-Lamar merger -- to warrant further investigation by the directors. *Resp. App.* at 1.

6. In the case at bar, the FDIC alleged -- without offering proof -- that Shrader & York was responsible for ensuring regulatory compliance by Lamar and City with the transactions. *Pet. App. B* at 26a. However, in *Lamar v. Adams* the FDIC's predecessor sued the Austin, Texas law firm of Shanks & Butler for, among other things, failing to ensure regulatory compliance by Lamar and City with the

some of the same transactions, including the RDC transaction and the Lamar-Brazos merger. Shanks & Butler's role, unmentioned by the FDIC in the case at bar, was enough that the complaint against Shanks & Butler alleged that "they were the attorneys who handled the commercial loan and investment transactions .... In particular, they failed to review, and to take reasonable steps to ensure compliance with, laws and regulations applicable to said transactions and failed to take reasonable steps to protect Lamar's interests in said transactions." *Resp. App.* at 2.

7. The FDIC alleged only that the respondents were negligent. The FDIC has not suggested that the respondents were part of a conspiracy with Adams and others, that they were aiders and abettors of Adams, or that they acted intentionally to harm Lamar or City. *Pet. App. A* at 2a, 25a.

8. *Additional background as to the respondent Page.* On September 4, 1991, four months after the FDIC filed suit against the other respondents, and the day before the district court granted summary judgment as to the other respondents, the FDIC moved for leave to name Page as a defendant and served Page with summons to appear and defend.[1] The district court did not grant the FDIC's motion

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[1] The respondent Page was a trial lawyer who had nothing to do with the transactions, and who left Shrader & York in March 1983, more than eight and a half years before he was sued. The FDIC's complaint against Page was that he was a partner in Shrader & York at the time of the January 1983 RDC transaction. The FDIC did not allege or seek to

for leave to join Page as a defendant, but nonetheless ordered that summary judgment be granted in favor of Page against the FDIC.

9. The FDIC has offered as Appendix B to its petition the district court's September 5, 1991 summary judgment against the FDIC's claims against the respondents other than Page. The FDIC has not cited this Court to the district court's summary judgment of the FDIC's claims against Page, and accordingly has apparently not sought review of that separate judgment.

10. The FDIC has petitioned for review of the Fifth Circuit's judgment, and offers as Pet. App. A the Fifth Circuit's opinion affirming the district court's summary judgment. The Fifth Circuit's opinion does not refer to Page. The opinion does specifically refer to the FDIC's action brought in May 1991, but there is no mention of any subsequent action in September 1991, pursuant to which the FDIC purported to join or attempt to join Page as a defendant. Pet. App. A at 2a. The Fifth Circuit's opinion likewise refers to

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prove that Page participated in or gave any advice regarding any of the transactions in question. Further, although the FDIC appears to have sued Page for the losses claimed from all five transactions in issue, by virtue of the FDIC's limited contention that Page was a partner at Shrader & York only during the RDC transaction in January 1983, and the FDIC's concession that Page left the Shrader & York partnership in March 1983, it appears the FDIC concedes there is absolutely no basis for Page to be liable for four of the five transactions which took place after he left Shrader & York.

the district court's September 5, 1991 opinion at 777 F. Supp 533. Pet. App. A at 2a. The district court's September 5, 1991 opinion does not refer to Page. Pet. App. B.

11. Since the FDIC has identified Page as a respondent, Page responds now out of an abundance of caution and with the renewed request that he be completely dismissed from these proceedings.

12. Further, even if this Court completely accepted the FDIC's erroneous arguments that a negligence action against respondents was not yet barred by limitations when the FDIC acquired it on May 18, 1988, the FDIC yet failed to sue Page even within the three year grace period allowed by FIRREA. The FDIC did not even seek leave to sue Page until September 4, 1991, more than three years after it acquired the putative negligence claim against Page. Accordingly, if Page had been properly brought before the district court, the Fifth Circuit Court of Appeals or this Court, the FDIC's claims against Page were barred by limitations. There is nothing in the record to indicate that the FDIC has informed any court of any reason to toll limitations against Page beyond May 18, 1991, and accordingly Page's motion for summary judgment was properly granted.

13. *The district court's decision.* The court's September 5, 1991, summary judgment opinion cited the FDIC's own pleadings to support the finding that Adams

knew of the facts which the respondents allegedly failed to disclose, that Adams' knowledge was properly imputable to the corporations, and that the causes of action thus had accrued no later than 1985. *Pet. App. B.* at 28a. The court held the malpractice claims were barred by the Texas two-year statute of limitations before the FSLIC and then the FDIC acquired the claims. *Id.* at 27a. The district court declined the FDIC's invitation to re-write FIRREA to create a rule whereby the FDIC's acquisition of a failed institution would revive stale claims. *Id.* at 28a-29a. The district court likewise held that the FDIC had failed to present any summary judgment evidence that the financial loss complained of was caused by the alleged negligence of the respondents. *Id.* at 29a.

14. *The Fifth Circuit's decision.* The Fifth Circuit affirmed the September 5, 1991 order of summary judgment. The Fifth Circuit agreed with the district court's observations that FIRREA "does not revive stale state law claims acquired by the FSLIC or FDIC," and that if the FDIC's claims expired before May of 1988 the respondents' statute of limitations defense was meritorious. *Pet. App. A* at 7a. The FDIC had agreed that the Texas limitation period for legal malpractice claims was two years, and that the transactions giving rise to the claims against respondents all occurred before May of 1986. The Fifth Circuit noted that the FDIC's claims had expired before they were acquired by the FSLIC in May of

1988 unless the FDIC prevailed on one of the equitable doctrines it urged to extend the limitation period. *Id.*

15. The FDIC argued (1) that Texas's discovery rule kept the statute of limitations from running before May of 1988, and alternatively (2) that the doctrine of adverse domination tolled the running of limitations. *Id.* at 7a, 8a. The Fifth Circuit ruled that under the federal summary judgment rule -- contrary to the Texas state procedural rule under which the FDIC's local counsel apparently operated in responding to the motions for summary judgment -- "the FDIC bore the burden of producing some summary judgment evidence in support of its discovery rule argument." *Id.* at 8a, 9a.

16. Under the Texas discovery rule, as the FDIC itself argued, the statute of limitations for legal malpractice begins to run when the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action. *Id.* at 10a. After carefully reviewing the record, including the FDIC's own statements in related cases against Adams, the Fifth Circuit ruled that the FDIC had simply not met its burden of proof in responding to the motions for summary judgment. "At trial, to successfully establish that Adams' knowledge of the fraudulent activity was not imputed to the corporation under the discovery rule, the FDIC would have to prove that Adams acted adversely or committed fraud

against City and/or Lamar. Therefore, to avoid summary judgment, it bore the burden of producing some summary judgment evidence of this argument.... An examination of the individual transactions reveals the inadequacy of the FDIC's summary judgment evidence on this issue." *Id.* at 18a, 19a, 20a. Because the FDIC did not meet its summary judgment burden -- and likely because the FDIC's own statements contradicted its argument -- the Fifth Circuit concluded that the statute of limitations was not extended or tolled. *Id.* at 10a.

17. The Fifth Circuit likewise rejected the FDIC's adverse domination argument. The summary judgment record -- the greater part of which was the FDIC's own statements -- showed that Adams was familiar with the transactions and knew the facts about which the FDIC claimed the respondents should have warned the corporations. *Id.* at 10a, 11a. "Adams should have discovered, through the exercise of reasonable care and diligence, the losses caused by the schemes and the other facts establishing City and Lamar's legal malpractice claims against Shrader & York." *Id.* at 12a. The Fifth Circuit held that the FDIC had not offered summary judgment evidence that Adams had acted adversely to the corporations, *Id.* at 19a-23a, and ruled that Adams's knowledge should be imputed to the corporations in accordance with the generally accepted rule that a bank officer or director's knowledge is imputed to the bank. *Id.* at 12a. The Fifth Circuit's opinion is careful and limited: "Moreover, the FDIC does not allege that Shrader and York committed intentional

torts, or conspired with Adams to defraud City or Lamar. Thus we agree with the district court that, in this particular case, Texas's discovery rule adequately addresses the FDIC's policy concern." *Id.* at 25a.

REASONS FOR DENYING THE PETITION

18. *This case has been and may again be properly disposed of on simple procedural grounds.* Put simply, the FDIC lost its case because it did not offer proof to meet its summary judgment burden. The proof before the district court clearly contradicted the FDIC's assertions. In its original brief before the Fifth Circuit, the FDIC suggested the district court was wrong to grant summary judgment because it somehow unfairly denied the FDIC sufficient discovery to respond to the appellees' motions for summary judgment. When the FDIC quoted from *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n.15 (1987) ("Summary judgment is available only 'after adequate time for discovery' has elapsed") (*Resp. App.* at 3), the FDIC sought to convey the impression it failed in its burden in responding to the motions for summary judgment only because the district court refused to allow it enough time to muster its proof. The FDIC's implied assertion was unfair to the district court and suggested something that was simply untrue. The FDIC's abandonment of that argument was the best proof that the argument lacked merit. The FDIC had never asked the district court for additional time to respond or to take

discovery. The very fact that the FDIC troubled to make the argument on appeal clearly indicates that the FDIC knew it had failed in its procedural burden and sought to escape the consequence of its failure to meet that procedural burden.

19. If the FDIC had truly needed some specific discovery to respond to respondents' motions for summary judgment, it was obligated to comply with Rule 56(f) by informing the district court what specific discovery was needed. *Securities & Exchg. Comm'n v. Spence & Green Chemical Company*, 612 F.2d 896 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981). Diligence in opposing a motion for summary judgment is required. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 832 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1967). The FDIC was not diligent in responding to the motions for summary judgment, and it did not meet its summary judgment burden. Accordingly, the petition for writ of certiorari should be dismissed.

20. *The FDIC failed to raise an issue of fact as to whether the respondents' alleged acts proximately caused the financial loss complained of by the FDIC.* The district court also rejected the FDIC's negligence claim because the FDIC failed to raise an issue of fact as to whether the respondents proximately caused an injury to Lamar and City. The district court ruled that the case was controlled by the proximate cause standard articulated in *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part and*

rev'd in part, 459 U.S. 375 (1983). To recover against the respondents for negligence, Lamar or City would have to prove that they justifiably relied on the alleged defects of the respondents' advice in taking the actions that allegedly led to their losses. Lamar and City would have to establish that Adams, who the FDIC contends controlled the corporations, was misled by the respondents' advice, and would not have acted as he did but for that advice. Without such proof the FDIC could not establish the essential element of but-for causation or cause-in-fact. To prevail in negligence against the respondents, the FDIC was required to prove that but for Lamar's and City's reliance on the alleged negligence of the respondents, they would not have taken the actions which the FDIC claims led to the losses. The FDIC could not and did not establish this "but-for" causation.

21. *This case may be disposed of as to Page because he has not been properly brought before the Court.* It appears Page has never been properly joined as a party, and should not be before this Court. It likewise does not appear from the record that the FDIC properly appealed to the Fifth Circuit with respect to Page or is even now seeking relief from the district court's order, subsequent to September 5, 1991, granting summary judgment against Page. Accordingly, Page should be dismissed.

22. *This case may be disposed of as to Page because he was not sued within the three year limitations*

period allowed for actions which are not barred by limitations when acquired by the FDIC. Further, even if this Court completely accepted the FDIC's erroneous arguments that a negligence action against respondents was yet alive when the FDIC acquired it on May 18, 1988, the FDIC yet failed to sue Page or move for leave to add him as a party within the three year grace period allowed by FIRREA. Accordingly, even if Page had properly been brought before the district court, the Fifth Circuit Court of Appeals or this Court, the FDIC's claims against Page were yet barred by limitations. Since the FDIC did not even plead the tolling agreements, summary judgment was compelled. Since the FDIC did not bring the district court's order granting Page's summary judgment forward before the Fifth Circuit, the Fifth Circuit was entirely correct in not mentioning that order in its affirming opinion. Again, Page should be dismissed from this proceeding.

23. *The Fifth Circuit correctly decided this case based on the record before it and the pertinent Texas law which both the FDIC and the respondents agreed controlled.* The Fifth Circuit's decision does not conflict with *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), or with any decision of this Court or of any other circuit, and the case does not otherwise warrant plenary review. Page respectfully adopts by reference the full arguments made by the other respondents, and adds the following by way of summary:

a. The FDIC now apparently concedes an argument, once ardently made by the FDIC, that FIRREA does not operate to revive stale claims.

b. The FDIC's claims of negligence became time-barred by the Texas two-year statute of limitations while those claims were still held by the assignor corporations. In the courts below, this is an issue which the FDIC argued was to be decided by applicable state law principles. It is at best inappropriate for the FDIC to challenge the decisions of the courts below based on a new argument that some amorphous and previously undescribed federal law should control.

c. The FDIC acquired by assignment only the rights its assignor had at the time of the assignment, and whether the statute ran against the assignor prior to assignment is purely a question of state law. The Fifth Circuit's opinion in the case at bar is consistent with the Ninth Circuit's decision in *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989):

> It is settled law that state limitations statutes are relevant in determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired before

> the government acquires a claim, the claim is not revived by transfer to a federal agency. *See Guaranty Trust Co. v. United States,* 304 U.S. 126, 142 (1938).

884 F.2d at 1309 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Pro Se Respondent

Excerpt from the Federal Savings and Loan Insurance Corporation's Second Amended Complaint against Stanley E. Adams, Shanks & Butler, and others

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAMAR FINANCIAL CORPORATION AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION in its corporate capacity,	§	CIVIL ACTION NO. A-88-CA-183
Plaintiffs,	§	
v.	§	
STANLEY E. ADAMS, *et al.*	§	

PLAINTIFF FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION'S SECOND AMENDED COMPLAINT

* * * *

92. In November of 1983, however, Brazos' outside auditors, Peat Marwick, wrote a letter to the boards of Brazos and Lamar spotlighting the highly-irregular and inappropriate jump in Brazos' expenses during the second quarter of 1983. Accordingly, the Lamar board was at least generally aware by November 1983 of Adams' et al.'s improper activities. Despite that knowledge, they took no

actions to carefully oversee and monitor Lamar's operations and thereby allowed Adams and his group to continue to run amok.

Second Amended Complaint at p. 58, ¶ 92.

* * * *

180. ... The basis of liability for the Shanks & Butler Defendants is the fact that they were the attorneys w ho handled the commercial loan and investment transactions which form the basis of the predicate acts of the RICO charge, as herein detailed. ... In particular, they failed to review, and to take reasonable steps to ensure compliance with, laws and regulations applicable to said transactions and failed to take reasonable steps to protect Lamar's interests in said transactions.

Second Amended Complaint at p. 98, ¶ 180.

* * * *

235. From 1982 through at least 1986, Shanks & Butler reviewed and drafted the documents which were used to close the fraudulent commercial transactions which are enumerated hereinabove.

Second Amended Complaint at p. 120, ¶ 235.

Excerpt from Brief of Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6315

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC
RESOLUTION FUND, STATUTORY
SUCCESSOR TO THE FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY

-against-

SHRADER & YORK, A TEXAS PARTNERSHIP IN
DISSOLUTION, *ET AL.*

BRIEF OF APPELLANT

* * * *

Summary judgment is available only "after adequate time for discovery" has elapsed. *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n. 15 (1987).